2002

Benjamin Frank Lucero v. Sheriff Aaron D. Kennard; Chief Paul Cunningham : Brief of Appellant

Utah Court of Appeals

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Joan C. Watt; Heather Brereton; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

BENJAMIN FRANK LUCERO,	:	
Defendant/Appellant,	:	
v.	:	
SHERIFF AARON D. KENNARD; CHIEF PAUL CUNNINGHAM; SALT LAKE COUNTY JAIL; MURRAY CITY JUSTICE COURT,	:	Case No. 20020984-CA
Plaintiffs/Appellees.	:	

BRIEF OF APPELLANT

Appeal from a denial of a petition for post-conviction relief. Appellant was convicted of driving under the influence of alcohol in Murray City Justice Court and was sentenced to an actual and suspended jail sentence. He subsequently filed a petition for post-conviction relief in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Glenn K. Iwasaki, Judge, presiding, which was denied.

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JURISDICTIONAL STATEMENT

Appellant/Petitioner/Defendant Benjamin Frank Lucero ("Mr. Lucero" or "Appellant") appeals from the denial of his petition for post-conviction relief, entered by the Honorable Glenn K. Iwasaki, Third District Court, Salt Lake County, Utah. A copy of the "Findings of Fact, Conclusions of Law, & Order of the Court" is in Addendum A. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (2002).

STATEMENT OF THE ISSUE, STANDARD OF REVIEW AND PRESERVATION

Issue. Mr. Lucero was not represented by counsel when he pleaded guilty in the Murray City Justice Court. The justice court judge sentenced Mr. Lucero to an actual and suspended jail sentence. Did Mr. Lucero make a constitutionally valid waiver of his Sixth Amendment right to counsel prior to pleading guilty?

Preservation. Mr. Lucero preserved this issue in the post-conviction proceedings. R. 1-2, 26-27, 36-44, 54-57, 116:5-48. He argued that he was sentenced to jail and suspended jail in violation of the Sixth Amendment to the United States Constitution, Argersinger v. Hamlin, 407 U.S. 25, 33 (1972), and Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764 (2002), and asked that the remaining suspended jail sentence be vacated. R. 27.

Standard of Review. The issue of whether a criminal defendant knowingly and voluntarily waived his right to counsel is a mixed question of law and fact. State v. Heaton, 958 P.2d 911, 914 (Utah 1998); a copy of Heaton is in Addendum B. The trial court's factual findings are reviewed for clear error and the legal conclusion as to whether the defendant made a constitutionally adequate waiver of the right to counsel is reviewed for correctness. State v. Vancleave, 2001 UT App 228, ¶5, 29 P.3d 680.

TEXT OF RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Mr. Lucero, represented by the Salt Lake Legal Defender Association ("LDA"),

filed a petition for post-conviction relief in Third District Court on August 1, 2002. R. 1-2. That petition claimed that Mr. Lucero was sentenced to an actual and suspended jail sentence in violation of the Sixth Amendment to the United States Constitution, and named Sheriff Aaron Kennard, Chief Paul Cunningham, the Salt Lake County Jail, and Murray City Justice Court as respondents. R. 1-2.

A Salt Lake County Deputy District Attorney appeared on behalf of Sheriff Kennard, Chief Cunningham and the Salt Lake County Jail, and filed an answer on August 7, 2002. R. 5-6. That answer acknowledged receipt of the petition and that at the time the petition was filed, Appellant was incarcerated. R. 5-6. The answer also indicated that those three parties were "without knowledge with respect to the allegations set forth in the petition" and would "immediately and faithfully comply and implement any order issued by the Court in this matter." R. 6.

The Murray City Attorney's office initially appeared on behalf of Murray City Justice Court and moved to dismiss the petition. R. 9-14. Mr. Lucero responded to Murray City Justice Court's motion to dismiss. R. 36-44. Murray City Justice Court filed a supplemental memorandum in support of its motion to dismiss on August 21, 2002. R. 71-76. Private counsel entered an appearance for Murray City Justice Court on September 9, 2002. R. 94. On September 16, 2002, Third District Court Judge Glenn Iwasaki held a hearing on the petition. R. 98-99. The district court concluded that Mr. Lucero had waived his right to counsel and dismissed the petition. On October 25,

2002, findings, conclusions and order were entered. R. 100-102; see Addendum A. Mr. Lucero filed a notice of appeal on November 18, 2002.

STATEMENT OF THE FACTS

1. Facts in the Justice Court Docket

Murray City charged Mr. Lucero with driving under the influence of alcohol ("DUI"), a class B misdemeanor, and improper usage of lanes, a class C misdemeanor, alleging that the crimes occurred on March 17, 2001. R. 28; see Addendum C containing Murray Municipal Court docket (R. 28-33). The charges were filed in Murray City Justice Court. R. 28.

Mr. Lucero was arraigned in Murray City Justice Court on June 14, 2001. R. 29. The minute entry in the docket for that date states, "[a]dvised of rights and penalties." R. 29. A pretrial conference was scheduled for July 20, 2001. R. 29.

The minute entry in the docket for July 20, 2001 indicates that Mr. Lucero made a motion to continue the pretrial conference and the motion was granted. R. 30. The minute entry indicates further, "[r]eason for continuance: Will look into retaining private counsel." R. 30. The pretrial conference was continued until October 26, 2001. R. 30.

The entry for October 26, 2001 shows that the pretrial conference was again continued at the defendant's request. R. 30. The reason for the continuance was again "[r]etaining private counsel." R. 30. The pretrial conference was rescheduled for January 2, 2002. R. 30.

Although the pretrial conference was continued twice so that Mr. Lucero could retain counsel, nothing in the docket indicates that the judge considered whether Mr. Lucero was indigent or conducted a colloquy to determine whether Mr. Lucero waived counsel prior to the plea hearing. Moreover, the docket shows that after twice continuing the pretrial conference to retain counsel, Mr. Lucero telephoned the clerk and said that he would not have a trial and instead would just pay the fine, and would inform the prosecutor of his decision. R. 31. This notation shows Mr. Lucero's complete lack of understanding of the process and potential sentence he faced, while also suggesting that he was unable to retain counsel. See R. 116:19, 31.

At the January 2, 2002 pretrial conference, the justice court set the matter for a bench trial on April 29, 2002. R. 31. Mr. Lucero appeared *pro se* on April 29, 2002 and pleaded guilty to the charge of driving under the influence of alcohol; the charge of improper usage of lanes was dismissed. R. 31. The docket entry for the plea hearing states in its entirety:

> The Information is read.
> Court advises defendant of rights and penalties.
> A pre-sentence investigation was ordered.
> The Judge orders Intermountain Substance Abuse to prepare a Pre-sentence report.
> TRIAL
>
> Case has been resolved. Deft pled guilty to count I. Upon motion from the city court orders count II dismissed.

R. 31.

On June 4, 2002, the justice court judge imposed sentence. R. 32. The docket entry indicates that the judge sentenced Mr. Lucero forthwith to a term of 180 days in jail and required that Mr. Lucero actually serve those 180 days in jail. R. 32. In addition to imposing the maximum jail term, the justice court judge also imposed a fine of $1850.00 with a surcharge of $855.41, required that the fine be paid by September 5, 2002, and placed Mr. Lucero on probation for eighteen months. R. 32-33. After the petition for post-conviction relief was filed, the Murray City Justice Court judge held a review, released Mr. Lucero, suspended the remainder of the jail sentence, and placed Mr. Lucero on probation. R. 116:5. Mr. Lucero had served 98 days of the 180 day jail sentence when he was released; a suspended jail sentence of 82 days remains in place. R. 116:5.

The justice court judge made a finding at sentencing that Mr. Lucero was indigent. R. 33. Following the terms of probation, the minute entry for sentencing states, "(court finds def. Impecunious)." R. 33.

2. Evidence Submitted During Post-conviction Proceeding

Gwen Kittel, an in-court clerk in the Murray Justice Court, submitted an affidavit as part of the post-conviction proceedings. R. 77-78. A copy of that affidavit is in Addendum D. That affidavit indicates that "prior to every arraignment, Judge Ferrero confirms that each defendant watched the 'Rights of Criminal Defendants' video narrated by [former] Judge Hutchings." R. 77. A transcript of the Hutchings videotape

is in Addendum E. According to Ms. Kittel, at the arraignment, Judge Ferrero also explains a defendant's rights and "orally advises each defendant of their rights, including their right to be represented by an attorney before he asks the defendant how they wish to plead." R. 77. The clerk also had the "convincing belief" that at the arraignment, "Judge Ferrero informed Mr. Lucero of his constitutional rights, including his right to be represented by an attorney and that if he could not afford to hire his own attorney, that one would be appointed for him free of charge." R. 78.

Counsel for the justice court proffered that the judge, who has taken hundreds of pleas, could remember Mr. Lucero but could not remember specifically what had occurred at the plea hearing. R. 116:16. Counsel proffered further that the judge could testify about his usual procedure:

> Counsel for the justice court: He can testify about his usual procedure.
>
> And generally, it's this: He has them sign the waiver and then says to them, now that you've signed these things and waived your rights, I need to satisfy my mind that you're doing this freely and voluntarily and you understand the consequences of it and he goes through those things one by one. And of course, that is in the file.
>
> He goes through the elements of the offense. He goes through the possible sentences. He tells them that - - about each of the rights they're waiving and in this case, in particular, one of those rights as you can see, is the right to be represented by counsel.
>
> Now, there's some - - in the petition, there is memorandum, she makes - - she says it's a little unclear as to whether he really has a right or whether he doesn't. I asked Judge Ferrero about that and he says, well, in fact, it - - the way it's stated is exactly correct. That is to say, if a - - if - - *you're not always afforded an attorney because you can't afford one. I mean, many of us, if we were charged with a serious crime probably couldn't afford an attorney.*

R. 116:16-17 (emphasis added). According to this proffer, the justice court judge went through the rights as listed in the form, including the depiction of the right to court-appointed counsel suggesting that such right does not exist in all cases where the defendant cannot afford to retain counsel. R. 116:16-17. Counsel further proffered that the judge would testify regarding his usual practice as follows:

> I-I think Judge Ferrero would testify that he goes through that [plea affidavit] with him, he helps him understand that he does have a right to an attorney, that if he can't afford one, one will be appointed. That's in addition to what he's already seen on the - - on the videotape.
>
> And then when he is through asking him all those questions, if he's satisfied that it's free - - done freely and voluntarily and knowingly and that he's not under the influence of substances or whatever, then he signs the thing and that his signature is certification of that.

R. 116:17; see R. 116:16-18 in Addendum F.

A second affidavit signed by Kaylynn Olsen, an in-court clerk, was also submitted by the justice court in the post-conviction proceedings. R. 85-86; see Addendum G. It claims that "prior to accepting any guilty plea, Judge Ferrero orally advises each defendant of their rights, including their right to be represented by an attorney." R. 85. This clerk had a "convincing belief" that "prior to accepting Mr. Lucero's guilty plea, Judge Ferrero orally informed Mr. Lucero of his constitutional rights, including the right to be represented by an attorney and that if he could not afford to hire his own attorney, that one would be appointed for him free of charge if he qualified based on his income." R. 86.

Kaylynn Olsen also indicated in her affidavit that Mr. Lucero had executed "a

written rights waiver form informing him of his right to counsel and expressing his desire to waive that right." R. 86. A copy of a document entitled "Driving Under the Influence Rights Waiver" ("plea affidavit") which was signed by Mr. Lucero was attached to Murray City's "Memorandum in Support of . . . Motion to Dismiss." R. 15-19. A copy of the plea affidavit is in Addendum H. Regarding the right to counsel, that document states,

> COUNSEL: I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.

R. 15.

While the judge and clerks could not remember the specifics of Mr. Lucero's case and instead talked about usual practices, Mr. Lucero did remember the specifics. Mr. Lucero testified that he had been trying to get an attorney for quite awhile but was unable to do so because he was not working. R. 116:21. He testified further that he was totally confused. R. 116:21. On cross-examination, Mr. Lucero testified that he had "pretty much" watched the Hutchings videotape, that he understood that he had the right to an attorney at public expense if he could not afford one, and that he told the judge he could not afford an attorney because he was not working. R. 116:21-22. The judge asked how much money he made. R. 116:22. Mr. Lucero told the judge how much money he received as disability payments and the judge said he could not have a lawyer

because he made too much money. R. 116:22.[1]

Mr. Lucero's only previous involvement with the law had occurred about thirty years before this incident, in the 1970's. R. 116:22. Because so much time had passed, Mr. Lucero did not remember whether he had been told at the hearings in the 1970's that he had the right to court-appointed counsel if he could not afford to retain a lawyer. R. 116:23. Mr. Lucero could not recall whether he had read the plea form, but testified that the judge did not go over that form in any kind of detail. R. 116:23-24. Mr. Lucero could remember the judge asking him some questions, but the specifics of those questions were not delved into at the post-conviction hearing. R. 116:24.

After Mr. Lucero testified and was subjected to cross-examination, counsel for the justice court proffered that the justice court judge could not remember whether he asked Mr. Lucero about his assets, but the judge's usual practice when a defendant asked for an attorney was to ask about assets and income. R. 116:25-26.

The affidavit of impecuniosity filed along with the petition demonstrates that Mr. Lucero was indigent. R. 19-22; a copy of the affidavit is in Addendum I. On July 31, 2002, three months after he pleaded guilty, Mr. Lucero's assets included a 1978 truck and a 1981 motorcycle which had a total value of $3500. R. 19, 22. Mr. Lucero had debts totaling $3500 and monthly expenses of $800. R. 20. He had no income.

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[1] At sentencing, however, the judge found that Mr. Lucero was impecunious. R. 33.

R. 19, 22. He was not employed in July 2002, and his last employment had been in February 2002, two months prior to pleading guilty without assistance of counsel. R. 21.

SUMMARY OF THE ARGUMENT

The Sixth Amendment right to counsel applies in this case where Mr. Lucero pleaded guilty and was sentenced to an actual and suspended jail sentence. The constitutional right to counsel must be "jealously protected" and cannot be waived simply by expressly stating that one waives his rights. Instead, in order to establish a constitutionally adequate waiver of the right to counsel, a trial court must (1) advise the defendant of the danger and disadvantages of proceeding without counsel, (2) advise the defendant that he has a constitutional right to self-representation as well as a right to counsel and court-appointed counsel if he is indigent, (3) ascertain that the defendant has the intelligence and capacity to understand and appreciate the consequences of proceedings without counsel, and (4) ascertain that the defendant understands the nature and elements of the charges, the possible punishments and any other facts necessary to an understanding of the case.

None of the requirements for establishing a knowing and voluntary waiver were met in this case. While Utah case law requires that the record of a colloquy between the court and defendant be reviewed in order to determine whether the defendant waived counsel, even if the lack of a record in a non-record court were considered an extraordinary circumstance, review would be limited to the justice court docket and

papers filed in the justice court. The justice court docket and papers do not establish that the requirements for a knowing and voluntary waiver of the right to counsel were met in this case. Moreover, even if the testimony from court personnel presented at the post-conviction proceeding is considered, it fails to establish a knowing and voluntary waiver of the right to counsel.

There is no indication that Mr. Lucero wanted to proceed without counsel. Instead, the docket shows that the pretrial conference was continued twice while Mr. Lucero attempted to retain counsel. Mr. Lucero ultimately telephoned the court after the second continuance of the pretrial conference and indicated that he would just pay the fine. This indicates that he did not understand the potential penalties or the consequences he faced since a DUI conviction carries a mandatory jail sentence.

The justice court did not advise Mr. Lucero of the dangers and disadvantages of proceeding without counsel. It also did not advise Mr. Lucero that he had a constitutional right to self-representation. Additionally, the advice regarding the right to counsel did not clearly and correctly inform Mr. Lucero that he had a constitutional right to counsel and a constitutional right to court-appointed counsel if he were indigent.

Additionally, the justice court made no effort to ascertain that Mr. Lucero possessed the intelligence and capacity to understand the consequences of proceeding *pro se*. Moreover, the record demonstrates that Mr. Lucero did not understand the consequences since he thought he could just pay a fine for a DUI conviction.

The justice court also did not ascertain that Mr. Lucero understood the nature and elements of the charges, the possible penalties and other facts necessary for an understanding of the case. The plea affidavit was wholly inadequate under Rule 11, Utah Rules of Criminal Procedure and due process. It failed, among other things, to inform Mr. Lucero that he had the right to a speedy trial by an impartial jury, that he had a limited right to appeal, or that he faced mandatory jail if convicted and also failed to give a factual basis for the plea. While Mr. Lucero is not asking to vacate his plea, the inadequacy of the affidavit demonstrates that Mr. Lucero did not knowingly and voluntarily waive counsel.

The record does not demonstrate that Mr. Lucero knew what he was doing when he proceeded without counsel or that he understood the risks he was facing. While he did sign a plea affidavit which outlines a waiver of rights, including the right to counsel, case law makes it clear that an express statement that one waives counsel is not sufficient to establish a constitutionally adequate waiver of the right to counsel. In this case where the record demonstrates that a constitutionally adequate waiver of the right to counsel was not made, the district court erred in dismissing the petition; the suspended jail sentence that remains in place must be vacated.

ARGUMENT

POINT. THE DISTRICT COURT ERRED IN DISMISSING THE PETITION BECAUSE THE SIXTH AMENDMENT WAS VIOLATED WHEN THE JUSTICE COURT IMPOSED AN ACTUAL AND SUSPENDED JAIL SENTENCE IN THE ABSENCE OF A CONSTITUTIONALLY VALID WAIVER OF THE RIGHT TO COUNSEL.

A. MR. LUCERO DID NOT MAKE A CONSTITUTIONALLY VALID WAIVER OF THE RIGHT TO COUNSEL.

1. The Sixth Amendment guarantees the right to counsel in this case.

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for the defence." This amendment, applicable to the states through the Fourteenth Amendment, guarantees an accused the right to counsel and requires appointment of counsel if the defendant is indigent. Heaton, 958 P.2d at 917 (citing *inter alia* Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963)); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); State v. Wulffenstein, 733 P.2d 120, 121 (Utah 1986)); see also Utah Code Ann. § 77-32-301 (1999); Argersinger v. Hamlin, 407 U.S. 25 (1972).

The constitutional right to counsel applies to misdemeanors as well as felonies whenever actual imprisonment or a suspended jail sentence is imposed. Argersinger, 407 U.S. at 28-37; Alabama v. Shelton, 535 U.S. 654, 654 (2002). In Argersinger, the Court recognized the importance of the right to counsel in ensuring a fair proceeding, and held "that absent a knowing and intelligent waiver, no person may be imprisoned for any

offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Argersinger, 407 U.S. at 31, 37. The United States Supreme Court recently reiterated the importance of the right to counsel, and clarified that such right attaches any time an actual or suspended jail sentence is imposed. See Shelton, 535 U.S. at 654.

Because the penalty for DUI includes a mandatory jail sentence (see Utah Code Ann. § 41-6-44 (4) (Supp. 2002)), a person such as Mr. Lucero who is charged with DUI has a Sixth Amendment right to counsel. In cases where the Sixth Amendment right to counsel applies, a court cannot sentence a defendant to an actual or suspended jail sentence unless the defendant makes a constitutionally adequate waiver of the right to counsel. See Argersinger, 407 U.S. at 31; Shelton, 535 U.S. at 654, 658. This is so regardless of whether the defendant pleads guilty or goes to trial. See Von Moltke v. Gillies, 332 U.S. 708, 722 (1948). In fact, "[a] waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." Id. There is no question that Mr. Lucero had a Sixth Amendment right to counsel in this case where he was sentenced to an actual and suspended jail sentence.

2. The right to counsel must be "jealously protected" and is not waived simply by signing a written waiver that purports to waive that right.

Because of the fundamental and important role played by the right to counsel in a criminal proceeding, courts are required to "jealously protect[]" that right. Heaton, 958

P.2d at 917. The trial judge has the "weighty responsibility . . . of determining whether there is an intelligent and competent waiver by the accused." Id.; see also State v. Bakalov, 849 P.2d 629, 633 (Utah Ct. App. 1993) ("Bakalov I"); State v. Bakalov, 862 P.2d 1354, 1355 (Utah 1993) ("Bakalov II"); State v. Frampton, 737 P.2d 183, 187 (Utah 1987). There is a presumption against waiver of the right to counsel, "and doubts concerning waiver must be resolved in the defendant's favor." Heaton, 958 P.2d at 917; see also State v. Arguelles, 2002 UT 104, ¶70, 459 Utah Adv. Rep. 3 ("we indulge every reasonable presumption against waiver of the right [to counsel]").

"[B]efore the court may permit the defendant to proceed without the assistance of counsel, the court must conduct a thorough inquiry of the defendant to fulfill its duty of insuring that the defendant's waiver of counsel is knowingly, intelligently, and voluntarily made." Heaton, 958 P.2d at 917-18. "In making this determination, the court must advise the defendant of the dangers and disadvantages of self-representation 'so that the record will establish that "he knows what he is doing and his choice is made with eyes open."'" Heaton, 958 P.2d at 917 (further citation omitted); see also Arguelles, 2002 UT 104, ¶70 (reiterating this requirement); State v. White, 56 N.Y. 2d 110, 118 (N.Y. 1982) (emphasizing that waiver of the right to counsel is not "a routine rubber-stampable formality . . ." and that "'a right too easily waived is no right at all'" (further citation omitted)).

The "preferred method of establishing the validity of a waiver is a colloquy on the

record between the court and the defendant." Arguelles, 2002 UT 104, ¶70. "The reasoning behind this requirement is that the information necessary for the court to make its determination generally 'can only be elicited after penetrating questioning by the trial court.'" Heaton, 958 P.2d at 918 (citing Von Moltke, 332 U.S. at 724, for the proposition that "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances").

This Court and the Utah Supreme Court have repeatedly outlined the minimum requirements for such a colloquy, requiring that the trial court advise the defendant of the dangers and disadvantages of proceeding without counsel, and, in addition, (1) advise the defendant of his right to counsel as well as his right to self-representation; (2) ascertain that the defendant has the intelligence and capacity to understand and appreciate the consequences of proceeding without counsel; and (3) ascertain that the defendant understands the nature and elements of the charges, the possible punishments, and any other facts that are necessary for an understanding of the case. Arguelles, 2002 UT 104, ¶70 (citing Heaton, 958 P.2d at 918; State v. Petty, 2001 UT App 396, ¶6, 38 P.3d 998, cert. denied, 42 P.3d 951 (Utah 2002)); see also Frampton, 737 P.2d at 187 n.12 (outlining questions a trial court could ask to ascertain whether a defendant knowingly

waives his right to counsel).[2] In addition to advising the defendant of the dangers and disadvantages of proceeding without counsel, the trial court must:

> (1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to represent himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story; and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

Heaton, 958 P.2d at 917; see also Arguelles, 2002 UT 104, ¶70. The "focus is not solely on the trial court's express advice," but also on "whether the colloquy clearly establishes the defendant's level of understanding." Petty, 2001 UT App 396, ¶6 (citing State v. McDonald, 922 P.2d 776, 779 (Utah Ct. App. 1996) (further citation omitted)); see also Vancleave, 2001 UT App 228, ¶17.

When an on-the-record colloquy does not exist, courts consider the record as a whole "and make a de novo determination regarding the validity of the defendant's waiver only in extraordinary circumstances . . . ." Heaton, 958 P.2d at 918. In making

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[2] In a footnote in Frampton, 737 P.2d at 187 n.12, the Utah Supreme Court outlined questions that could be asked of a defendant who requests self-representation so as to establish that the defendant's waiver of counsel is knowing and voluntary. Those questions delve into the defendant's education and background, understanding of the legal system and rules governing trials and procedure, and the defendant's understanding of the nature of the charges and penalties. The suggested discussion in Frampton also includes an admonition advising the defendant against proceeding without counsel and a suggestion by the judge that even if the defendant proceeds without counsel that standby counsel be appointed.

that review, "'"[c]ourts indulge every reasonable presumption against waiver" of the [right to counsel].'" Id. at 917 (citations omitted).

In Petty, this Court held that Petty had not knowingly waived his right to counsel and reversed Petty's conviction, remanding for a new trial. Petty, 2001 UT App 396, ¶¶11-12. After being informed that Petty wished to represent himself, the trial court conducted a brief colloquy with Petty. Id. at ¶7. During that colloquy, the court questioned Petty regarding his education and understanding of the system, and advised Petty against proceeding without counsel. Id.

> [T]he trial court inquired about Petty's education, his general understanding of the legal system, his knowledge of the Rules of Evidence and Procedure, and informed him that he had the right to counsel as well as the right to proceed pro se. The trial court also advised Petty against proceeding pro se and selected Petty's appointed counsel to act in a standby capacity.

Id. The trial court did not, however, "address whether Petty '"comprehended the nature of the charges and proceedings"' or the range of permissible punishments."' Id. (quoting Heaton, 958 P.2d at 918) (further citation omitted). This Court concluded that "absent a discussion of the nature of the charges and the range of possible penalties Petty faced, we cannot say that Petty had a proper understanding of the '"dangers and disadvantages of self-representation."'" Id. at ¶8 (further citation omitted). Because the trial court "failed to ensure that Petty was fully informed of the risks involved when he made his choice to proceed pro se," this Court reversed Petty's conviction and remanded the case for a new trial. Id. at ¶12.

A plurality of the United States Supreme Court likewise held in Von Moltke that the record did not demonstrate that the defendant made a constitutionally adequate waiver of the right to counsel. Von Moltke, 332 U.S. 708. The Court reached this conclusion even though Ms. Von Moltke appeared before a judge and "signed a paper stating that she waived the 'right to be represented by counsel at the trial of this cause,' and then pleaded guilty." Id. at 709.[3] In addition, the trial judge questioned Ms. Von Moltke during the plea hearing and she indicated that she "understood the indictment and was voluntarily entering a plea of guilty." Id. at 717. Further, Ms. Von Moltke was an "intelligent, mentally acute woman." Id. at 720. A lawyer was temporarily appointed for purposes of the arraignment and Ms. Von Moltke met with two lawyers on another occasion, but a lawyer was not appointed to represent her following arraignment. Id. at 712, 714, 718. She did meet with FBI agents and government lawyers and discussed the details of her case and her concerns prior to pleading guilty, but the plurality recognized that legal advice from government lawyers is not the type of service contemplated by the Sixth Amendment right to counsel. Id. at 715, 725. Although Ms. Van Moltke had expressly stated that she waived counsel, the plurality

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[3] Von Moltke is a plurality decision with four justices joining in the lead opinion. Those four justices agreed that the record failed to demonstrate a knowing and voluntary waiver of the right to counsel and would have reversed the habeas court's decision. Two additional justices agreed that the district court judgment should be set aside, but believed the lower court should make further findings on the waiver issue. Von Moltke, 332 U.S. at 726.

concluded that the record of the subsequent habeas proceeding "show[ed] that when petitioner pleaded guilty, she did not have that full understanding and comprehension of her legal rights indispensable to a valid waiver of the assistance of counsel." Id. at 720.

The conclusion that Ms. Von Moltke did not make a constitutionally valid waiver of her right to counsel even though she expressly waived that right was supported by a number of considerations. The Sixth Amendment guarantees the right to counsel and court-appointed counsel if the defendant is unable to hire a lawyer and courts must carefully protect that right. Id. at 720. The right to counsel is as important, if not more so, when a person pleads guilty as it is when a person goes to trial because, among other things, a lawyer is critical in determining whether the state can prove all of the elements of the charge. Id. at 721-22. A trial judge has the duty and "solemn obligation" when "a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of [the right to counsel]." Id. at 722. "This duty cannot be discharged as though it were a mere procedural formality." Id. To discharge this duty, the judge must make a thorough and penetrating examination of all of the circumstances; "[t]he fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." Id. at 724. Because the record failed to demonstrate that Ms. Von Moltke knowingly and voluntarily waived her right to counsel, a majority of the court vacated the habeas court's judgment. Id. at 726-27.

Von Moltke and Petty, along with a number of other cases, make it clear that simply signing a waiver form or stating on the record that one waives the right to counsel is not enough to establish a constitutionally valid waiver of the right to counsel. Indeed, such a purported waiver along with questioning by the trial court was not sufficient to establish a knowing and voluntary waiver in either of those cases. Instead, as Utah appellate courts have repeatedly mandated, a trial judge must ensure that the right to counsel is carefully protected by (1) advising the defendant of the dangers and disadvantages of proceeding *pro se*, (2) advising the defendant of the right to counsel as well as the right to self-representation, (3) ascertaining that the defendant has the intelligence and capacity to understand and appreciate the consequences of proceeding without counsel, and (4) ascertaining that the defendant understands the nature and elements of the charges, the possible punishments including any mandatory punishment, and any other facts that might be necessary to understanding the case.

3. The post-conviction court incorrectly concluded that Mr. Lucero made a constitutionally adequate waiver of the right to counsel.

There is no transcript from the justice court from which to conclude that the justice court conducted a constitutionally adequate colloquy with Mr. Lucero or otherwise met the requirements for a constitutionally adequate waiver as outlined in Heaton, Petty and other cases. Even if this Court were to consider the lack of record in a justice court an extraordinary circumstance that justified consideration of the justice court docket and filings, those documents fail to establish a constitutionally adequate

waiver of the right to counsel. Moreover, even if this Court considers the after-the-fact evidence submitted at the post-conviction proceeding, that evidence fails to demonstrate that the requirements for a constitutionally adequate waiver, as set forth in Heaton and numerous other cases, were met in this case.

(a) Because there is no record of the colloquy between the justice court judge and Mr. Lucero, the post-conviction court incorrectly concluded that Mr. Lucero had waived his right to counsel.

Utah case law is clear that the preferred method for establishing a knowing and voluntary waiver of the right to counsel is an on-the-record colloquy between the judge and the defendant. Arguelles, 2002 UT 104 at ¶70. Because a justice court is not a court of record, a review of an on-the-record colloquy between the judge and the defendant can never be made in a justice court case. Arguably, the lack of a record in justice court cases precludes higher courts from ever concluding that the defendant made a knowing and voluntary waiver of the right to counsel because in the absence of a record, there is no way of ascertaining whether the justice court judge conducted penetrating and in depth questioning and otherwise delved into the matter sufficiently to demonstrate a knowing and voluntary waiver of the right to counsel. Even in cases where a judge has conducted an on-the-record colloquy with the defendant, higher courts have concluded that the colloquy was not sufficiently penetrating to demonstrate a knowing and voluntary waiver of the right to counsel. See e.g. Von Moltke, 332 U.S. at 723-24; Petty, 2001 UT App 396 at ¶¶7-9. Given "the central importance of the colloquy in

determining whether a defendant has validly waived his right to counsel" (Petty, 2001 UT App 396 at ¶9), the lack of an on-the record colloquy between the justice court judge and Mr. Lucero precluded the district court from concluding that Mr. Lucero made a constitutionally adequate waiver of his right to counsel.

Alternatively, even if this Court were to look beyond the lack of an on-the-record colloquy, the review should be limited to a consideration of information found in the justice court docket and filings. While the preferred method for establishing waiver of the right to counsel is an on-the-record colloquy, Utah case law allows courts to look beyond the record of the colloquy to determine whether there was a knowing and voluntary waiver of the right to counsel only in extraordinary circumstances. Heaton, 958 P.2d at 918. When extraordinary circumstances justify looking beyond the colloquy, courts look to the record as a whole and make a de novo determination. Id.

Assuming for the sake of argument that the absence of a record in justice court is an extraordinary circumstance that justifies considering something other than an on-the-record colloquy in determining whether a criminal defendant made a constitutionally adequate waiver of the right to counsel, it would seem that any review of "the record as a whole" would go no further than a review of the justice court docket and the papers filed in the justice court. In other words, in order to follow the mandate of this Court and the Utah Supreme Court, courts would look no further than the docket and documents filed in the justice court in determining whether a defendant knowingly and voluntarily

waived the right to counsel. Such an approach is consistent with Heaton , Petty and other cases that allow, at most, a review of the record as a whole.

Moreover, such an approach prevents the temptation to reach a post-judgment rationalization or tainting of what actually occurred. See generally State v. Ramirez, 817 P.2d 774, 789 (Utah 1991) (refusing to remand a case for findings and to allow the trial judge to address an admissibility question where there was conflicting evidence and such a remand would "tempt [the court] to reach a post hoc rationalization for the admission of this pivotal evidence" and that "[s]uch a mode of proceeding holds too much potential for abuse"). Allowing a judge or court personnel to testify after the fact as to the details of a colloquy would hold an enormous potential for abuse and fail, due to faulty memories and lack of detail, to ensure that waivers of counsel are knowingly and voluntarily made.

Utah Code Ann. § 78-5-121 (2002) requires justice courts to keep a docket which includes, among other things, "minutes of the pleadings and motions in writing by referring to them, and if not in writing, by a concise statement of the material parts of the pleadings." "Entries in a justice court judge's docket under 78-5-121, certified by the judge or his successor in office, are prima facie evidence of the facts stated." Utah Code Ann. § 78-5-122 (2002); see also State v. Bailey, 282 P.2d 339, 341 (Utah 1955) (justice court docket is prima facie evidence of facts stated in the docket). Because the justice court is required to keep entries of what transpires, these provisions further demonstrate

that even if courts were to look beyond the on-the-record colloquy requirement when determining whether a constitutionally adequate waiver of counsel was made in justice court, the consideration should be limited to the justice court docket and filings, rather than general, after-the-fact testimony.

This Court's decision in State v. Gutierrez, 2003 UT App 95, 470 Utah Adv. Rep. 52 does not require consideration of testimony from court personnel regarding the details of the proceedings in the context of this case. The issue in Gutierrez was whether a justice court plea was involuntary; Heaton and other case law that ordinarily requires a review of the plea colloquy and allows only in extraordinary circumstances a review of the record as a whole for determining whether counsel was waived was not implicated in Gutierrez. Instead, this Court was considering in Gutierrez whether a defendant's claim in an enhanced DUI case that his prior convictions in justice court were involuntary could be supported solely by the defendant's "self-serving affidavit." Gutierrez, 2003 UT App 95, ¶11. This Court stated that when challenging the voluntariness of plea in that context, "a defendant seeking to rebut the presumption of regularity must produce a transcript, testimony regarding taking of the plea, a docket sheet, or other affirmative evidence." Id. While Gutierrez allows a defendant challenging the voluntariness of a plea to submit testimony from court personnel regarding the details of the proceedings in the context of that case, it does not necessarily follow that the justice court can submit such testimony in a case where a defendant claims that he did not make a constitutionally

adequate waiver of counsel. This is so because case law regarding waiver of the right to counsel requires a review of the plea colloquy or, at most, a review of the record as a whole in extraordinary circumstances.

In this case where the justice court docket and file fail to demonstrate a constitutionally adequate waiver of the right to counsel, consideration of testimony by court personnel is unwarranted. This Court need not reach the issue of whether testimony from court personnel is appropriate, however, because even if all of the evidence submitted at the post-conviction hearing is considered, it fails to demonstrate a knowing and voluntary waiver of the right to counsel.

> *(b) Even if the "record" as a whole is considered, the justice court docket and plea affidavit fail to demonstrate a knowing and voluntary waiver of the right to counsel; additionally, the materials submitted at the habeas hearing, when considered along with the docket and plea affidavit, fail to demonstrate a knowing and voluntary waiver of the right to counsel.*

Although the justice court is charged with keeping a concise statement of what occurred (see Utah Code Ann. § 78-5-121), the docket in this case does not contain findings or conclusions by the justice court that Mr. Lucero knowingly and voluntarily waived his right to counsel. R. 28-33. Nor is there any indication in the docket that the justice court judge conducted a colloquy with Mr. Lucero regarding waiver of counsel or otherwise took the necessary steps to establish a knowing and voluntary waiver of the right to counsel. It appears from the docket that the judge never made a determination that Mr. Lucero knowingly and voluntarily waived his right to counsel and instead

proceeded with the case without ever conducting the type of penetrating questioning that is required for a constitutionally valid waiver of the right to counsel.

The absence of a record of the plea colloquy coupled with the failure of the justice court to make findings and conclusions that Mr. Lucero knowingly and voluntarily waived his right to counsel precludes such a conclusion after the fact. See generally Petty, 2001 UT App 396 at ¶9 (further citation omitted) (pointing out that "'[appellate] court's proper role is to review the trial court's findings and conclusions and then determine whether the trial court correctly concluded that the defendant validly waived counsel'"). Indeed, in a non-record court where a summary of any hearings are included in the docket, the failure to include a notation that the judge determined that the defendant waived counsel should preclude a higher court from determining that the judge made such a determination.[4]

Moreover, regardless of whether the justice court judge concluded that Mr. Lucero waived his right to counsel, the docket and plea affidavit do not demonstrate a constitutionally adequate waiver of that right. As a preliminary matter, in order to consider the contents of the plea affidavit, that affidavit must be incorporated into the

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[4] The lack of notation that the judge conducted a colloquy or found that Mr. Lucero waived counsel is particularly significant in light of the fact that a notation appears in the docket indicating that at sentencing, the judge found Mr. Lucero to be impecunious. The sentencing notation regarding Mr. Lucero's impecuniosity demonstrates that the justice court would include a notation if it conducted a colloquy regarding waiver of counsel or found that Mr. Lucero had waived counsel.

plea colloquy as required by Utah case law. See State v. Maguire, 830 P.2d 216, 217-8 (Utah 1991); State v. Visser, 2000 UT 88, ¶15, 22 P.3d 1242; State v. Gibbons ,740 P.2d 1309, 1312-14 (Utah 1987). The trial court must personally establish during the colloquy "that the defendant has read, has understood, and acknowledges all of the information contained [in the affidavit]." Visser, 2000 UT 88, ¶¶11-12. An affidavit can be considered when the trial court questions the defendant during the plea hearing and ascertains that the defendant read and understood the affidavit, and clarifies any ambiguities, omissions or uncertainties. State v. Smith, 812 P.2d 470, 476-77 (Utah Ct. App. 1991).

In this case, the docket fails to even mention the plea affidavit, let alone include notations indicating that the justice court judge personally established that Mr. Lucero had read and understood the affidavit. Instead, it indicates that "[t]he Information is read" and the "Court advises defendant of rights and penalties." R. 31.

Nor does the proffer of the justice court judge's testimony indicate that the judge personally established that Mr. Lucero read and understood the plea affidavit. Reading the information and advising a defendant of his rights and penalties is not sufficient to incorporate an affidavit. Maguire, 830 P.2d at 217-18. Nor is the signature of the defendant indicating that he read the affidavit sufficient to incorporate it. Id. Instead, the affidavit itself must be discussed and its contents clarified in order to incorporate the affidavit into the plea proceeding. Visser, 2000 UT 88, ¶¶11-12. While the affidavit

itself states that the judge or a lawyer has explained the constitutional rights, and the defendant has read and understands the contents of the affidavit (R. 16-17), these statements do not indicate that the judge discussed the affidavit with the defendant during the hearing or otherwise took the steps necessary to ensure that Mr. Lucero had read, understood, and acknowledged the affidavit. Under Utah case law, the lack of a record demonstrating that the judge ascertained that Mr. Lucero had read and understood the affidavit and clarified any ambiguities precludes the incorporation of the plea affidavit into the plea colloquy.

Even if the affidavit is considered, however, the affidavit and docket fail to demonstrate a constitutionally adequate waiver of the right to counsel. The marshaled evidence found in the docket and plea affidavit in support of a determination that Mr. Lucero waived his right to counsel is as follows[5]:

> 1. At the arraignment on June 14, 2001, Mr. Lucero was "[a]dvised of rights and penalties." R. 29.
>
> 2. The pretrial conference was continued twice because Mr. Lucero "will look into retaining private counsel" and was "retaining private counsel." R. 30.

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[5] A determination that a criminal defendant made a constitutionally adequate waiver is a question of law that is reviewed for correctness. See Vancleave, 2001 UT App at ¶5. Any factual findings supporting that determination are reviewed for clear error. Although this issue involves a question of law, Mr. Lucero marshals the evidence for the court's convenience.

3. The case was set over for a bench trial after the second scheduled pretrial conference. At the bench trial hearing, the Information was read and "the Court advise[d] defendant of rights and penalties." R. 31.

4. The plea affidavit, entitled "Driving Under the Influence Rights Waiver" was signed by Mr. Lucero. It contains a paragraph regarding the right to counsel that states:

> COUNSEL: I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.

R. 15.

5. Following this paragraph regarding the right to counsel, five additional constitutional rights are addressed. On page two of the form, after the last of these constitutional rights is addressed, the form contains a paragraph that states:

> I understand each of these constitutional rights. They have been explained to me by the judge or a lawyer. I have no question about them. I know that I could plead not guilty and exercise all of the rights listed above. I understand that by entering a plea of guilty.[sic] I AM GIVING UP THESE CONSTITUTIONAL RIGHTS.

R. 16. The affidavit is signed on page four. R. 18.

The additional marshaled evidence presented at the habeas hearing is as follows:

1. The arraignment clerk submitted an affidavit that did not include a specific recollection of Mr. Lucero's case and instead outlined the justice court judge's usual practice at arraignment. That usual practice included "orally advis[ing] each defendant of their rights, including the right to be represented by an attorney before he asks the defendant how they wish to plead." R. 77. The arraignment clerk had a "convincing belief" that the judge "informed Mr. Lucero of his constitutional rights, including his right to be represented by an attorney and that if he could not afford to hire his own attorney, that one would be appointed for him free of charge." R. 77.

2. The arraignment clerk's affidavit also indicated that it was the justice court judge's usual practice to confirm prior to arraignment that each defendant watched the "Rights of Criminal Defendants" videotape narrated by former Judge Hutchings ["Hutchings videotape"].

3. The Hutchings videotape states in regard to the right to counsel:

If you plead guilty or no contest, you will not have a trial and you will be giving up or waiving certain rights. These rights are:

. . .

Also, the right to hire your own lawyer to represent you. If you will be hiring your own lawyer, please tell the judge today. If you want to have a lawyer represent you and if you do not have the money to hire one, you can ask the judge to appoint a public defender. You will need to tell the judge about your financial situation and the judge will decide if you qualify for a public defender.

See transcript of Hutchings videotape in Addendum E.

4. Another in-court clerk submitted a similar affidavit. It also contained information about the judge's usual practice, but nothing specific to this case. According to the affidavit, the judge's usual practice is "prior to accepting any guilty plea, [the judge] orally advises each defendant of their rights, including the right to be represented by an attorney." R. 85-6. This second clerk also had a "convincing belief" that the justice court judge "informed Mr. Lucero of his constitutional rights, including the right to be represented by an attorney and that if he could not afford to hire his own attorney, that one would be appointed for him free of charge if he qualified based on income." R. 86.

5. The second clerk also indicated that Mr. Lucero had executed a written waiver of rights form. R. 86. This is the plea affidavit referred to above.

6. Counsel for the justice court proffered the testimony of the justice court judge. The proffer included information about the judge's usual practice, but no details specific to Mr. Lucero's case. The judge's usual practice is to have defendants sign the waiver in the affidavit, then tell defendants, "now that you've signed these things and waived your rights, I need to satisfy my mind that you're doing so freely and voluntarily and you understand the consequences of it and he goes through those things one by

one." R. 116:16-17. The judge goes through the elements, sentences, and rights being waived, including the right to counsel. R. 116:16-17. As part of the proffer, counsel indicated that the justice court judge correctly stated the constitutional right to counsel does not always include the right to court appointed counsel when someone cannot afford a lawyer. R. 116:16-17.

7. Counsel for the justice court also proffered that the judge could not remember whether he asked Mr. Lucero about his assets, but the judge's usual practice when a defendant asks for an attorney is to ask about assets and income.

(i) The justice court judge did not inform Mr. Lucero of the dangers and disadvantages of proceeding without counsel.

Neither the docket nor the plea affidavit demonstrate in any way that the justice court judge informed Mr. Lucero of the dangers and disadvantages of proceeding *pro se*. See Arguelles, 2002 UT 104 at ¶70. Advising a defendant of rights and penalties is distinct from advising a defendant of the dangers and disadvantages of proceeding *pro se*. Since advising a defendant of the dangers and disadvantages of proceeding *pro se* is necessary for a waiver of the constitutional right to counsel (see e.g. Heaton, 958 P.2d at 918), the absence of an indication in the docket and plea affidavit that the judge gave such an admonition precludes the finding of a knowing and voluntary waiver of the right to counsel. The district court therefore incorrectly concluded that Mr. Lucero knowingly and voluntarily waived his right to counsel.

Even if this Court looks beyond the justice court docket and filings, the evidence presented as part of the habeas proceeding likewise fails to demonstrate that the justice court advised Mr. Lucero of the dangers and disadvantages of proceeding without

counsel. The information presented by the justice court was not specific to Mr. Lucero's case. R. 77-78, 85-86, 116:17-18, 26. Further, it failed to contain any suggestion that the justice court judge had discussed with Mr. Lucero the dangers and disadvantages of proceeding *pro se*. Id. Indeed, the judge's proffer and affidavit suggest that the judge believed a general recitation of rights along with a general waiver was sufficient to proceed without counsel. R. 116:17-18. This failure to advise the defendant of the dangers and disadvantages of proceeding *pro se* precludes a determination that Mr. Lucero made a constitutionally adequate waiver of the right to counsel.

(ii) The justice court judge did not clearly and correctly advise Mr. Lucero regarding his right to counsel and did not advise him regarding his right to self-representation.

The docket and plea affidavit also fail to demonstrate that the justice court judge clearly and correctly advised Mr. Lucero regarding his Sixth Amendment right to counsel as well as his right to self-representation. Mr. Lucero therefore did not make a constitutionally adequate waiver of his right to counsel.

There is no indication in either the docket or affidavit that the justice court judge advised Mr. Lucero that the right to self-representation is a distinct constitutional right. Such an admonition is necessary for a constitutionally adequate waiver of the right to counsel. See Heaton, 958 P.2d at 917. Advising a defendant that s/he has a constitutional right to self-representation is important in demonstrating a knowing waiver because it emphasizes that proceeding without counsel is a choice being made by a

criminal defendant rather than a fallback position when the defendant is unable to retain counsel.

Additionally, as far as the advice given concerning the right to counsel, the docket and plea affidavit fail to demonstrate that Mr. Lucero was correctly advised regarding the nature of this right. The docket states that the justice court judge advised Mr. Lucero of his rights on two occasions. The docket does not specify what rights were covered or the nature of what was said regarding each right. Given the fundamental importance of the right to counsel, it cannot be presumed from this general notation that the justice court judge correctly advised Mr. Lucero regarding the right to counsel, or even that he specifically discussed the right to counsel. Judges often list rights, thinking they are covering all relevant constitutional rights, and nevertheless miss something. See e.g. State v. Tarnawiecki, 2000 UT App 186, ¶4, 5 P.3d 1222.

Moreover, the depiction of the right to counsel in the plea affidavit suggests that the right is not absolute, and instead, that the judge has discretion as to whether to appoint counsel. R. 15. Rather than clearly stating that a defendant has the constitutional right to counsel and if the defendant is indigent, a constitutional right to appointed counsel, the affidavit never indicates the constitutional magnitude of the right and instead suggests that the right to counsel is qualified, that the decision as to whether to appoint counsel is discretionary with the judge, and that even if counsel is appointed, the defendant might be required to pay for counsel. R. 15. The affidavit states:

> COUNSEL: I have the right to consult with and to be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge *could* appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.

R. 15 (emphasis added). This passage does not clearly convey that an indigent criminal defendant has a constitutional right to court-appointed counsel. Instead, it states that if the judge decides that someone is unable to afford to retain counsel, the judge *could* i.e. may or may not appoint counsel. Because the affidavit and docket do not demonstrate that Mr. Lucero was clearly and correctly advised regarding the right to counsel as well as the right to proceed *pro se*, the district court erroneously concluded that Mr. Lucero made a knowing and voluntary waiver of his right to counsel.

The existence of the Hutchings videotape also does not correctly clarify the nature of the right to counsel or otherwise establish that Mr. Lucero was correctly and adequately advised regarding the nature of this right. Nothing in the justice court file indicates that this videotape was shown to Mr. Lucero.[6] Additionally, nothing suggests

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[6] According to one of the affidavits filed by the court clerks, the justice court judge routinely shows the Hutchings videotape to criminal defendants prior to arraignment. Nothing in this affidavit or the record states that the tape was shown to Mr. Lucero. Additionally, nothing in the affidavit or elsewhere suggests that the judge attempted to incorporate the videotape into the plea colloquy or the arraignment hearing by asking Mr. Lucero whether he watched, understood and acknowledged the information in the videotape. Since it is necessary to make sure a defendant read and understood a plea affidavit in order to incorporate that affidavit into a plea hearing (see Maguire, 830 P.2d at 217-18; Smith, 812 P.2d at 476-77), it follows that at the very least, a judge must make sure the defendant has watched, understood and acknowledges the information in the videotape in order to incorporate the videotape. Since a plea affidavit

that even if Mr. Lucero was shown the videotape at arraignment, that videotape was incorporated into the plea hearing by the justice judge asking Mr. Lucero whether he watched, understood and acknowledged the contents of the videotape. See Maguire, 830 P.2d at 217-18 (in order to incorporate the plea affidavit, the judge must ascertain that defendant read, understands and acknowledges the contents of the plea affidavit). The contents of the videotape therefore should play no role in determining whether the justice court adequately informed Mr. Lucero of the nature of his right to counsel.

Mr. Lucero's acknowledgment as part of the post-conviction proceedings that he "pretty much" watched the videotape does not change this result. Mr. Lucero's testimony does not establish that Mr. Lucero watched the entire tape or understood the contents. Without questioning by the judge and information that Mr. Lucero watched and listened to the entire tape and understood its contents, the videotape should not be considered.

Even if it is considered, however, the videotape fails to clarify the nature of the right to counsel. Rather than clearly indicating that an indigent defendant has the absolute right to court-appointed counsel, the videotape suggests that appointment of counsel is discretionary with the judge. The tape never states that an indigent defendant has a constitutional right to court-appointed counsel. Instead, it begins by telling

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is specific to a defendant's case whereas the videotape is general in nature and shown to a room full of people, it also follows that a court wishing to rely on the contents of the videotape as part of a waiver of rights must do something more to incorporate the videotape than is required for incorporation of a plea affidavit.

defendants they have the right to hire their own lawyers. It later tells the defendant that if he does not have money to hire a lawyer, he "can ask the judge to appoint a public defender" and "the judge will decide if you qualify for a public defender." Tape at 3; see Addendum E. In regard to the right to counsel, the tape states:

> Also, the right to hire your own lawyer to represent you. If you will be hiring your own lawyer, please tell the judge today. If you want to have a lawyer represent you and if you do not have the money to hire one, you can ask the judge to appoint a public defender. You will need to tell the judge about your financial situation and the judge will decide if you qualify for a public defender.

See Addendum E at 3. This passage fails to inform a defendant that he has an absolute constitutional right to court-appointed counsel if he is indigent, and fails to ensure that the right to counsel is "jealously protected."

Moreover, the additional testimony presented at the post-conviction hearing indicates that the judge did not consider the right to appointed counsel absolute even when a defendant cannot afford to retain counsel. According to the proffer made by counsel for the justice court, the justice court believed the right to court-appointed counsel did not apply in all cases where a defendant could not afford to retain counsel. R. 116:17. The proffer states in part:

> Now there's some - - in the petition, there is a memorandum, she says it's a little unclear as to whether he really has a right or whether he doesn't. I asked [the justice court judge] about that and he says, well, in fact, it - - the way it's stated is exactly correct. That is to say, if a - - if - - you're not always afforded an attorney because you can't afford one. I mean, many of us, if we were charged with a serious crime probably couldn't afford an attorney.

R. 116:16-17. Contrary to this statement, in any case where a defendant is unable to retain counsel without jeopardizing his ability to provide basic necessities for himself and his family, the Sixth Amendment requires that counsel be appointed. See State v. Vincent, 883 P.2d 278, 282-83 (Utah 1994). This proffer further demonstrates that the justice court failed to clearly and correctly inform Mr. Lucero that he had the right to appointment of counsel if he were indigent.

Because the trial court failed to adequately advise Mr. Lucero that he had the constitutional right to self-representation as well as the constitutional right to court-appointed counsel, the district court erred in concluding that Mr. Lucero made a knowing and voluntary waiver of his right to counsel.

(iii) There is no evidence that the justice court judge ascertained that Mr. Lucero possessed the intelligence and capacity to understand and appreciate the consequences of proceeding pro se.

Additionally, nothing in the docket or plea affidavit demonstrates that the justice court ascertained that Mr. Lucero possessed the intelligence and capacity to understand and appreciate the consequences of proceeding *pro se*. Advising a defendant of rights and penalties is not enough to establish a constitutionally adequate waiver; instead, among other things, the trial judge must also engage the defendant in a colloquy that is sufficiently in-depth that the judge can ascertain that the defendant understands the consequences of proceeding without a lawyer. The judge must not only advise the defendant regarding his right to counsel and self-representation as well as the dangers

and disadvantages of proceeding *pro se*, but must also determine that the defendant has a level of understanding that is sufficient to establish a constitutionally adequate waiver of the right to counsel. See Petty, 2001 UT App 236 at ¶7.

Nothing in the docket or plea affidavit demonstrates that the justice court ascertained that Mr. Lucero possessed the intelligence and capacity to understand and appreciate the consequences of proceeding without counsel. In fact, the docket demonstrates that Mr. Lucero was confused and did not understand the consequences of proceeding without a lawyer since he called and told the clerk that he would not have a trial and instead just pay the fine. R. 31. Since "just paying a fine" is not a possible outcome for a DUI conviction, this notation demonstrates Mr. Lucero's lack of understanding. Moreover, the docket demonstrates that when Mr. Lucero "called to inform the court that he would like to just pay [the] fine instead of trial" (R. 31), the justice court did nothing to dispel Mr. Lucero's incorrect understanding of the consequences. Instead, the docket indicates that "Def. will call the city to inform them of his decission [sic]" (R. 31), suggesting that the court left Mr. Lucero with the incorrect perception that he could simply pay a fine if he chose not to take the DUI case to trial.

The information introduced at the habeas proceeding likewise does not demonstrate that the justice court ascertained that Mr. Lucero possessed the intelligence and capacity to understand and appreciate the consequences of proceeding *pro se*. Indeed, nothing in either the docket or the habeas proceedings suggests that the justice

court judge understood that such an ascertainment was a necessary part of a waiver of counsel. See R. 28-31; 116:16-17.

Mr. Lucero's only previous involvement with the criminal justice system was in the 1970's, approximately thirty years ago. R. 116:22. The length of time since the prior involvement suggests a lack of familiarity with the criminal justice system and the consequences he faced. Other than this very distant involvement in the criminal justice system, there is nothing in the record about Mr. Lucero's educational background or familiarity with the rules of procedure and evidence or criminal law. This missing information coupled with the obvious confusion Mr. Lucero had about the consequences he faced establishes not only that the justice court did not make the necessary determination as to Mr. Lucero's intelligence and capacity, but also that Mr. Lucero lacked the capacity to understand and appreciate the consequences of proceeding without counsel. The district court therefore incorrectly concluded that Mr. Lucero made a constitutionally adequate waiver of his right to counsel.

(iv) The justice court judge did not ascertain that Mr. Lucero understood the nature and elements of the charges, the possible penalties and other facts necessary for an understanding of the case.

In order to have a constitutionally adequate waiver of the right to counsel, the record must also demonstrate that the defendant understood the nature and elements of the charges, the possible punishment, and any other facts necessary for an understanding of the case. The record does not demonstrate such an understanding or that the justice

court ascertained that Mr. Lucero had such an understanding.

The docket shows that Mr. Lucero "called to inform the court that he would like to just pay fine instead of trial. Def. will call the city to inform them of his decission [sic]." R. 31. Since "just pay[ing] fine]" is not an option in a DUI case, this entry demonstrates that Mr. Lucero did not understand the potential penalties he faced; see discussion supra at 40. Nothing in the docket suggests that the justice court made any effort to correct Mr. Lucero's misunderstanding. In fact, the entry suggests that the court may have enhanced the misunderstanding by giving the impression that Mr. Lucero could make such a decision. R. 31.

Additionally, the plea affidavit was not properly incorporated and should not be considered; see discussion supra at 28-30. Even if the plea affidavit were properly incorporated, however, it fails to correct Mr. Lucero's misunderstanding. The affidavit contains a general recitation of the potential penalties for class B and C misdemeanors. It does not specify, however, the designation for DUI and does specifically state that a plea of guilty to this charge carries a potential sentence of six months. Moreover, the plea affidavit does not mention that DUI carries a mandatory jail sentence. Even if Mr. Lucero had not evidenced confusion about the potential sentence, this affidavit is defective in conveying the required information about potential sentence because it does not inform Mr. Lucero that he faced a potential sentence of six months jail and would serve at least two days of mandatory jail time. See Utah Code Ann. § 41-6-44(4) (Supp.

2002). In the face of Mr. Lucero's obviously incorrect perception about the potential sentence he faced, this defective recitation of potential sentences for class B and C misdemeanors fails to demonstrate that Mr. Lucero understood the potential penalty.

The proffer at the habeas proceedings that as a general practice, the judge "goes through the possible sentences" likewise fails to demonstrate that the judge ascertained that Mr. Lucero understood the possible penalties he faced. The judge's usual routine does not establish that in this case the judge followed that routine. Additionally, there is no way of knowing whether the judge clarified that DUI is a class B misdemeanor with mandatory jail or just reiterated the general information in the plea affidavit regarding potential sentences for class B and C misdemeanors. Also, since the plea affidavit fails to mention the mandatory jail, it seems likely that the judge would not mention that at the hearing. Moreover, even if the judge correctly stated that potential penalty, nothing demonstrates that Mr. Lucero understood the penalty he faced. Given the fact that the justice court docket establishes that Mr. Lucero did not understand that he faced a jail sentence, the general proffer submitted at the post-conviction hearing fails to establish that Mr. Lucero understood the potential penalties he faced.

Additionally, assuming for the purposes of argument that the plea affidavit was properly incorporated and can be considered, that affidavit was defective under Rule 11, Utah Rules of Criminal Procedure and due process. While Mr. Lucero is not asking to withdraw his guilty plea, the defectiveness of the affidavit under Rule 11 and due process

is nevertheless pertinent because it fails to establish that Mr. Lucero understood the nature and elements of the charges, the possible punishments and any other facts necessary to an understanding of the case. Strict compliance with the Rule 11 requirements is mandated so that the record establishes that a defendant understood the nature and consequences of pleading guilty and acted knowingly and voluntarily when he entered the guilty plea and waived his constitutional rights. See Gibbons, 740 P.2d at 1312-14. When a defendant waives his right to counsel along with other rights while pleading guilty and the guilty plea is not in compliance with Rule 11 and due process, any purported waiver of counsel is likewise not knowing and voluntary since the record fails to demonstrate that the defendant understood the nature and elements of the charges, the possible punishments, and any other facts that are necessary for an understanding of the case.

Aside from not being properly incorporated, the affidavit in this case fails to comply with Rule 11 and due process in several substantial ways. Rule 11(e)(1) mandates that a court find not only that the defendant waived the right to counsel, but also that the defendant "does not desire counsel" in cases where the defendant is not represented. The docket shows that Mr. Lucero was trying to retain counsel; this suggests that he wanted counsel, not that he did not desire counsel. Nothing else suggests that Mr. Lucero did not desire counsel in this case. Moreover, Mr. Lucero testified at the post-conviction proceeding that he asked for court-appointed counsel and

the request was denied.

The affidavit also does not inform the defendant that he has the right to trial by an *impartial* jury; nor does it state that the defendant has the right to a *speedy* trial. See Utah R. Crim. P. 11(e)(3); Tarnawiecki, 2000 UT App 186, ¶916-18 (plain error occurs when a trial court fails to inform a defendant that he has the right to a speedy trial where the plea is taken prior to the start of trial). Additionally, the affidavit does not inform the defendant that the right to appeal is limited. See Utah R. Crim. P. 11(e)(8). Further, while the affidavit lists the general punishment for class B and class C misdemeanors, it does not specify that DUI is a class B misdemeanor. Nor does the affidavit state that a DUI charge carries a mandatory jail sentence; Rule 11(e)(6) requires such information as part of the informing defendant of penalty. The affidavit also does not contain a factual basis for the plea. See Utah R. Crim. P. 11(e)(4)(B); Gibbons, 740 P.2d at 1313 (a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts . . . ").

The wholly inadequate affidavit utilized in this case failed to inform Mr. Lucero of the nature and elements of the charges, the possible penalties and any other facts necessary for an understanding of this case. Because the docket and affidavit fail to demonstrate that Mr. Lucero understood the nature of the charges, how the required elements related to his actions, the mandatory jail sentence attached to DUIs, the fact that he had the right to a speedy trial by an impartial jury, the fact that he had a limited right

to appeal, and whether he did not desire counsel, the docket and affidavit failed to demonstrate the third required factor for a knowing and voluntary waiver. The district court therefore erred in concluding that Mr. Lucero made a constitutionally adequate waiver of his right to counsel.

(v) The district court erred in concluding that Mr. Lucero knowingly and voluntarily waived his right to counsel.

The district court erred in concluding that Mr. Lucero made a constitutionally adequate waiver of his right to counsel in this case where the requirements set forth in Heaton and other cases were not met; see discussion supra at 33-45. Nothing in the justice court record or the record from the post-conviction proceeding suggests that Mr. Lucero requested self-representation or proceeded without counsel because he wished to represent himself. Instead, the record shows that he desired counsel since the pretrial conference was continued twice while Mr. Lucero attempted to retain counsel. R. 29, 30. Mr. Lucero testified that he had asked the justice court to appoint counsel, but the court refused. R. 116:22. This case is even clearer than Heaton and Petty in demonstrating that counsel was not waived because in those cases, the defendant had asked to proceed without counsel. Moreover, the fact that Mr. Lucero desired counsel works against a determination that he knowingly and voluntarily waived counsel.

Additionally, while a court is required to take a constitutionally adequate waiver of the right to counsel regardless of whether a defendant is entitled to court-appointed counsel, the fact that Mr. Lucero was indigent and entitled to court-appointed counsel

also weighs against a determination that he knowingly and voluntarily waived his right to counsel in this case. The justice court record establishes that Mr. Lucero was indigent when he was sentenced. Indeed, the justice court found him to be impecunious at sentencing. R. 33. The affidavit filed as part of the post-conviction proceedings likewise demonstrates that Mr. Lucero was indigent when he entered his plea. R. 19-22. He had assets totaling $3500 and liabilities in the same amount. In addition, he spent $800 a month to live. R. 19-22. He had not worked since before the plea hearing. R. 21. The justice court's factual finding that Mr. Lucero was impecunious along with the affidavit filed in the post-conviction proceeding demonstrate that Mr. Lucero was unable to retain counsel due to his poverty. See generally Vincent, 883 P.2d at 283 (a defendant is entitled to court-appointed counsel if payments to counsel "would place undue hardship on the defendant's ability to provide the basic necessities of life for the defendant and the defendant's family").

Mr. Lucero testified that he had asked for court-appointed counsel and such request had been denied. The record from the post-conviction proceeding demonstrates that although Mr. Lucero was indigent, he was never provided with the opportunity for court-appointed counsel. Proceeding without counsel when the right to court-appointed counsel has been denied is not a constitutionally adequate waiver of the right to counsel. Indeed, the failure to provide Mr. Lucero with court-appointed counsel violated the Sixth Amendment. See Shelton, 535 U.S. at 658.

This case does not turn on whether Mr. Lucero is indigent, however. Even if Mr. Lucero had not been indigent, the Sixth Amendment required that the justice court judge go through the steps outlined in Heaton and other cases in order to demonstrate a constitutionally adequate waiver of the right to counsel. While a defendant who refuses to hire counsel even though he is able to afford to do so may be found to voluntarily waive the right to counsel based on that refusal, a court nevertheless is required to adequately advise that defendant regarding the risks and disadvantages of proceeding in that fashion and otherwise ascertain that the defendant is proceeding without counsel in a knowing and voluntary fashion.

In this case, the justice court (1) did not inform Mr. Lucero of the dangers and disadvantages of proceeding without counsel, (2) did not clearly and correctly advise Mr. Lucero regarding the nature of his right to counsel or that he had the right to self-representation, (3) did not ascertain that Mr. Lucero possessed the intelligence and capacity to understand and appreciate the consequences of proceeding *pro se*, and (4) did not ascertain that Mr. Lucero understood the nature and elements of the charges, the possible penalties and other facts necessary for an understanding of the case. Since failure to demonstrate any of these precludes a determination that a constitutionally adequate waiver of the right to counsel was made, the failure to do all four leaves no question that Mr. Lucero did not waive his right to counsel.

Indeed, nothing in this record suggests that Mr. Lucero made a decision to

proceed without counsel, let alone, that he "'underst[ood] the risks he face[d] in making that decision[].'" State v. Balderrama, 2003 UT App 139, ¶4 (unpublished) (quoting Petty, 2001 UT App 396 at ¶6). Mr. Lucero did know what he was doing and did not proceed with his eyes open. See Heaton, 958 P.2d at 912. Under these circumstances, the post-conviction court erred in concluding that Mr. Lucero waived his right to counsel.

B. THE SIXTH AMENDMENT VIOLATION REQUIRES THAT THE SUSPENDED JAIL SENTENCE BE VACATED.

The United States Supreme Court held in Shelton "that a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution of the crime charged." Shelton, 535 U.S. at 658. Because of the Sixth Amendment violation in Shelton, the Court affirmed the decision of the Alabama Supreme Court invalidating the portion of Shelton's sentence that imposed a suspended jail term. Id. at 659, 674. The Sixth Amendment violation in this case likewise requires that the aspect of Mr. Lucero's sentence that imposes a suspended jail sentence must be invalidated.

CONCLUSION

Appellant/Petitioner/Defendant Benjamin Frank Lucero respectfully requests that this Court reverse the decision of the district court and order that the suspended jail sentence be vacated.

SUBMITTED this 12th day of May, 2003.

Joan C. Watt

JOAN C. WATT
Attorney for Defendant/Appellant

HEATHER BRERETON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies each to to Karl L. Hendrickson, Deputy District Attorney, 2001 S. State St., S3600, Salt Lake City, Utah 84190-1210, and Scott Daniels, P. O. Box 521328, Salt Lake City, Utah 84152-1328, this 12th day of May, 2003.

Joan C Watt
JOAN C. WATT

DELIVERED to the Utah Court of Appeals, Karl L. Henrickson and Scott Daniels as indicated above this _____ day of May, 2003.

_____

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT
COUNTY OF SALT LAKE, STATE OF UTAH

BENJAMIN FRANK LUCERO, **Petitioner/Defendant** **vs.** **SHERIFF AARON D. KENNARD; CHIEF PAUL CUNNINGHAM; SALT LAKE COUNTY JAIL; MURRAY CITY JUSTICE COURT,** **Respondents/Plaintiff.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDER OF THE COURT** **Civil Case No. 020907208** **Judge: GLENN K. IWASAKI**

On September 16, 2002, this matter came before the Court for an evidentiary hearing on Respondent Murray City Justice Court's Motion to Dismiss the Petitioner's Petition for Extraordinary Post-Conviction Relief. Present at the evidentiary hearing were Benjamin Lucero, the Petitioner; Heather Brereton, Attorney for Petitioner; Karl Hendrickson, Attorney for Sheriff Aaron D. Kennard, Chief Paul Cunningham and the Salt Lake County Jail; Scott Daniels Attorney for the Murray Municipal Justice Court and P. Gary Ferrero, Murray Justice Court Judge.

After reviewing the evidence and considering the applicable law, the Court makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. The Petitioner appeared pro-se throughout the proceedings in the Murray Municipal Justice Court.
2. On two separate occasions, the Petitioner requested his case to be continued so that he could retain an attorney; both requests were granted by Judge P. Gary Ferrero.
3. The Petitioner was not new to the criminal justice system because he had some previous experience with criminal court proceedings.

4. The Petitioner viewed the videotape "Rights of Criminal Defendants" narrated by Judge Hutchings at his arraignment which specifically explains a defendant's right to counsel and that the court can appoint an attorney if the defendant qualifies.

5. Although not case specific, the proffered testimony of Judge P. Gary Ferrero and the affidavits of the Murray Municipal Justice Court clerks indicate that it is Judge Ferrero's practice to explain to each defendant his or her right to counsel prior to accepting a plea.

6. The Petitioner read and signed a written rights waiver form which specifically indicated that he had the right to counsel and that the Judge could appoint an attorney if the defendant was too poor to hire his own attorney.

7. The written rights waiver form, read and signed by Petitioner, also specified the maximum penalties (fines and jail time) for the offense with which he had been charged. (DUI)

CONCLUSIONS OF LAW

1. During the proceedings in the Murray Municipal Justice Court, the Petitioner understood that he had a right to counsel and if he could not afford an attorney, one could be appointed by the Judge.

2. The Petitioner knowingly and voluntarily waived his right to be represented by an attorney when he entered his plea in the Murray Municipal Justice Court.

ORDER OF THE COURT

1. It is hereby ordered that Murray City Justice Court's Motion to Dismiss the Petitioner's Request for Extraordinary Post-Conviction Relief is granted and the Petitioner's Petition for Extraordinary Post-Conviction Relief is thereby dismissed.

DATED this 3 day of OCT, 2002.

10/25/02

GLENN K. IWASAKI
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Heather Brereton
Attorney for Petitioner

Karl Hendrickson
Attorney for Sheriff Aaron D. Kennard, Chief Paul Cunningham and the Salt Lake County Jail

Scott Daniels
Attorney for the Murray Municipal Justice Court

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order of the Court was mailed, postage pre-paid to:

Heather Brereton
Salt Lake Legal Defender's Association
Attorneys for Defendant
424 E. 500 S., Suite #300
Salt Lake City, UT 84111

Karl L. Hendrickson
Salt Lake County District Attorney's Office
2001 South State Street #S3600
Salt Lake City UT 84190

Scott Daniels
Attorney at Law
P.O. Box 521328
Salt Lake City UT 84152

DATED this 26 day of Oct, 2002.

Tab B

STATE of Utah, Plaintiff and Appellee

v.

John M. HEATON, Defendant and Appellant.

No. 950238.

Supreme Court of Utah.

May 1, 1998.

Defendant was convicted in the District Court, Ogden Department, Michael J. Glassman, J., of aggravated robbery and evading arrest. Defendant appealed. The Supreme Court, Russon, J., held that: (1) burden of complying with the detainer statute was on the prosecutor, not the defendant; (2) delay occasioned by court clerk's error did not constitute good cause for delay under detainer statute; (3) extending trial date to a reasonable time outside detainer statute's 120-day disposition period to accommodate, in part, defense counsel's schedule constituted good cause for the delay under the statute; and (4) defendant did not knowingly and intelligently waive his constitutional right to appointed counsel.

Reversed.

1. Criminal Law ⇨1134(3)

Denial of defendant's motion to dismiss under detainer statute was reviewed for correctness, where decision was based on legal conclusion that clerk's administrative mistake could excuse prosecutor's duty to bring charges to trial within statutory time limit. U.C.A.1953, 77-29-1(1, 3, 4).

2. Criminal Law ⇨735

Whether a waiver of counsel was made knowingly and intelligently is a mixed question of law and fact.

3. Criminal Law ⇨1134(3)

Supreme Court reviews trial court's legal determinations for correctness.

4. Extradition and Detainers ⇨59

Burden of complying with the detainer statute was on the prosecutor, not the defendant, and thus, the defendant did not have the responsibility to find out why his case had not been sent for trial. U.C.A.1953, 77-29-1.

5. Extradition and Detainers ⇨59

Even though most of delay in bringing defendant to trial was occasioned by court clerk's error, this did not constitute good cause under detainer statute for delay since the prosecutor was not relieved of its burden of complying with the statute. U.C.A.1953, 77-29-1(1, 3, 4).

6. Extradition and Detainers ⇨59

When a prisoner delivers written notice pursuant to detainer statute, prosecutor has affirmative duty to have defendant's matter heard within statutory period; implicit in this duty is duty to notify court that detainer notice has been filed and to make good faith effort to comply with statute. U.C.A.1953, 77-29-1(1, 3, 4).

7. Extradition and Detainers ⇨59

Since the detainer statute places on the prosecutor alone the burden of bringing case to trial within 120-day period, the prosecutor's duty must be independent of the court's docketing system. U.C.A.1953, 77-29-1.

8. Criminal Law ⇨1134(6)

Even if lower court erred in its legal conclusions, Supreme Court may affirm trial court's decision on any reasonable legal basis, provided that any rationale for affirmance finds support in the record.

9. Extradition and Detainers ⇨59

Deciding whether the district court properly denied defendant's motion to dismiss pursuant to detainer statute requires two-step inquiry: first, Supreme Court must determine when the 120-day period commenced and when it expired, second, if trial was held outside the 120-day period, Supreme Court must then determine whether good cause excused the delay. U.C.A.1953, 77-29-1.

10. Extradition and Detainers ⇨59

Detainer statute's 120-day disposition period must be extended by amount of time

during which prisoner himself creates delay. U.C.A.1953, 77-29-1.

11. Extradition and Detainers ⇐59

Extending trial date to a reasonable time outside detainer statute's 120-day disposition period to accommodate, in part, defense counsel's schedule constituted good cause for the delay under the statute. U.C.A.1953, 77-29-1(3, 4).

12. Criminal Law ⇐641.4(4), 641.7(1)

Defendant did not knowingly and intelligently waive his constitutional right to appointed counsel, even though court refused to dismiss defense counsel, recommended that defendant rely on counsel during voir dire and strongly advised that he allow counsel to cross-examine state's witnesses, where trial court failed to advise defendant, at a minimum, of dangers and disadvantages of self-representation, and had already allowed defendant to proceed pro se when warnings involving defense counsel were issued. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.4(1)

Sixth Amendment guarantees an accused right to self-representation, provided only that he knowingly and intelligently forgoes his right to counsel. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⇐641.4(2)

When a trial court is confronted with defendant who either refuses to proceed to trial with appointed counsel or insists on proceeding pro se, court must carefully consider defendant's right to self-representation with his right to counsel. U.S.C.A. Const. Amend. 6.

15. Criminal Law ⇐641.7(1)

Before trial court may permit defendant to proceed without assistance of counsel, court must conduct thorough inquiry of defendant to fulfill its duty of insuring that defendant's waiver of counsel is knowingly, intelligently, and voluntarily made; in making this determination, the court must advise defendant of dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐641.7(1)

In addition to advising defendant of dangers and disadvantages of self-representation before permitting defendant to proceed without assistance of counsel, trial court should (1) advise defendant of his constitutional right to assistance of counsel, as well as his constitutional right to represent himself, (2) ascertain that defendant possesses intelligence and capacity to understand and appreciate consequences of decision to represent himself, including expectation that defendant will comply with technical rules and recognition that presenting defense is not just matter of telling one's story, and (3) ascertain that defendant comprehends nature of charges and proceedings, range of permissible punishments, and any additional facts essential to broad understanding of case. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐1139

In the absence of a colloquy on the record between the court and the defendant determining the validity of a waiver of counsel, Supreme Court will look at record and make de novo determination regarding validity of defendant's waiver only in extraordinary circumstances, the existence of which the Court will address on a case-by-case basis. U.S.C.A. Const.Amend. 6.

Jan Graham, Att'y Gen., Kris Leonard, Asst. Att'y Gen., Salt Lake City, for plaintiff and appellee.

Candace S. Bridgess, Kent E. Snider, Ogden, for defendant and appellant.

RUSSON, Justice:

INTRODUCTION

Defendant John M. Heaton appeals a judgment entered on a jury verdict finding him guilty of aggravated robbery, a first degree felony, and evading arrest, a third degree felony. We reverse.

BACKGROUND

Because some of the dates corresponding to the facts in this case are critical to the resolution of this appeal, we provide a detailed chronological summary of the relevant events.

On July 13, 1994, Heaton was arrested for the robbery of an Albertson's grocery store in Roy, Utah. The next day, Heaton waived his right to a preliminary hearing and was bound over to district court. Heaton was a parolee at the time, and on July 26, he was returned to the Utah State Prison for violating his parole. Heaton also qualified for public assistance and was appointed counsel from the public defender's office. On August 2, Heaton appeared in district court for arraignment, at which time he pleaded "not guilty" to the charges and the judge set a pretrial conference for August 30 and a jury trial for September 9. On August 25, while incarcerated at the prison, Heaton filed a written request for final disposition of all matters pending against him pursuant to Utah Code Ann. § 77-29-1 (the "detainer statute"), which requires the prosecutor to bring pending charges against a prisoner to trial within 120 days from the date the notice is delivered to certain state officials or their agents. An authorized agent at the prison received Heaton's notice on September 3.[1]

At his pretrial conference on August 30, Heaton requested a preliminary hearing, which he had initially waived. The prosecution had no objection, and the parties and the court agreed to hold a preliminary hearing on September 9, the date for which the trial had initially been set. At the September 9 preliminary hearing, the court found that probable cause existed and set a second arraignment for September 27. At the second arraignment, Heaton requested that the judge recuse himself on the basis that the judge had also presided over Heaton's preliminary hearing. The judge recused himself and ordered the case reassigned. However, as a result of an error in the district court clerk's office, the case was not reassigned. In late November 1994, after receiving inquiry by a witness regarding the trial date, the prosecutor contacted the district court for a status report, whereupon the clerk's office discovered the error and reassigned the case to a different judge as previously ordered.

On November 28, the district court sent the parties a notice of a trial-scheduling conference set for December 7. At that conference, the court initially attempted to set the trial date for January 19, 1995. However, because both defense counsel and the prosecutor had a scheduling conflict, the court set the trial for the next available date suitable for all the parties, February 16 and 17, 1995.[2]

Subsequent to the trial-scheduling conference on December 7, 1994, Heaton sent a letter to the court requesting new counsel. On February 8, 1995, the court held a hearing to address Heaton's request, which was based in part on his defense counsel's refusal to bring a motion to dismiss pursuant to the detainer statute. The court denied Heaton's request. On February 16, 1995, after reevaluating Heaton's claim, Heaton's defense counsel moved to dismiss pursuant to the detainer statute. The court, however, found that at least 60 days of the 71-day delay—i.e., the period between the second arraignment and the trial-scheduling conference—were attributable to the administrative error in the clerk's office. This delay, the court concluded, constituted "good cause" under the statute, and the court therefore denied the motion.

Although originally scheduled for February 16 and 17, 1995, the trial was not actually held until April 20 and 21, 1995.[3] Before trial, Heaton filed a pro se motion requesting that the judge recuse himself and requesting new counsel. A hearing was held on April 19, 1995, and the judge denied both requests.

During the hearing, Heaton indicated that he did not feel he was receiving adequate legal representation and that he felt forced to

1. The prosecutor's office received the notice on September 8. The record does not indicate whether the district court received Heaton's detainer notice; however, the prosecutor stated that he believed the court probably received the notice on September 8, 1994.

2. Defense counsel and the prosecutor were working on another criminal trial in mid-January.

3. The reasons for the trial delay from February to April are not pertinent to this appeal.

proceed on his own. His attorney indicated that a "rift" had developed between them, that he was uncomfortable going to trial because of the "total conflict" between them, and that he thought Heaton wanted to represent himself. Heaton did not assert his right to self-representation, and the judge did not ask Heaton whether he wished to waive his right to counsel. Instead, the judge (1) advised Heaton of his right to self-representation, (2) refused to permit Heaton's counsel to withdraw, (3) indicated to Heaton that he was requiring counsel to remain as standby counsel to assist Heaton if he wanted the assistance, and (4) indicated that Heaton was free to choose to handle trial matters on his own but that the court would make a record of Heaton's decision to proceed pro se.

Although Heaton's defense counsel assisted Heaton in selecting the jury, Heaton represented himself at trial. The jury convicted Heaton on both charges, and he was sentenced to serve concurrent terms of five years to life and zero to five years at the Utah State Prison, such terms to be served consecutively to any sentences Heaton was already serving.

On appeal, Heaton alleges the following errors: (1) the trial court erred in denying his motion to dismiss pursuant to the detainer statute; (2) he was denied his constitutional right to counsel; (3) he was denied his constitutional right to effective assistance of counsel; and (4) the prosecutor's misconduct during closing argument constituted reversible error.

STANDARDS OF REVIEW

[1] The trial court's decision to deny Heaton's motion to dismiss was based on its legal conclusion that under the detainer statute the clerk's administrative mistake could excuse the prosecutor's duty to bring Heaton's charges to trial within the 120–day period. Because this is a legal, rather than a factual, conclusion, we review the trial court's decision for correctness. *See State v. Petersen*, 810 P.2d 421, 425 (Utah 1991).

[2, 3] Whether a waiver of counsel was made knowingly and intelligently is a mixed question of law and fact. We review the trial court's legal determinations for correctness. *See State v. Pena*, 869 P.2d 932, 937–39 (Utah 1994); *Harding v. Lewis*, 834 F.2d 853, 857 (9th Cir.1987).

ANALYSIS

[4] Heaton first argues that the trial court erred in denying his motion to dismiss pursuant to the detainer statute. That statute provides, in relevant part:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, *he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.*
>
> . . . .
>
> (3) After written demand is delivered as required in Subsection (1), *the prosecuting attorney or the defendant or his counsel, for good cause shown in open court,* with the prisoner or his counsel being present, *may be granted any reasonable continuance.*
>
> (4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. *If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.*

Utah Code Ann. § 77–29–1(1), (3), & (4) (emphasis added).

In denying Heaton's motion to dismiss, the district court made the following ruling:

> [T]his Court is going to deny the Defendant's [motion on] the basis that I believe

that there has been good cause[.] And that term doesn't quite fit in this situation, but explainable cause shown as to why the delay occurred. And the Court does not find in any way that it was as a result of the prosecution's dragging its feet.

. . . .

The facts are that the bulk of the delay, 60 days at least of it, was the fault probably of the Clerk's office in this case. And again I don't know whether that fits into what could be called a good cause shown, but the Court believes that it happens from time to time, that there can be that kind of a glitch.

And certainly the Defendant could have pushed to find out why his case had not been set for trial. [He] [c]ould have pushed his counsel to make that request, [a]nd was in the same position [as was] the State. . . .

The case sat. And it is unfortunate it did, but the Court will deny the motion at this time.

The district court's ruling contradicts section 77–29–1 and our prior case law. The statute requires the prosecutor "to have the matter heard within the time required." Utah Code Ann. § 77–29–1(4). Moreover, this court has consistently held that the language of the detainer statute clearly places the burden of complying with the statute on the prosecutor. *See Petersen*, 810 P.2d at 424; *State v. Wilson*, 22 Utah 2d 361, 453 P.2d 158, 160 (1969). In *Petersen*, the trial court asked the defendant whether the trial date was acceptable, and the defendant did not object to the date, which was outside the 120–day period. Nevertheless, this court concluded that the defendant was not required to object to the trial date in order to maintain his rights under the statute because the burden of bringing the case to trial within the disposition period rested solely with the prosecution. 810 P.2d at 424. Thus, in the case at bar, the court clearly erred in concluding that Heaton was in the same position as was the State and therefore shared some of the responsibility to find out why his case had not been set for trial.

[5] The trial court further erred in its legal conclusion that the 71–day delay, most of which was occasioned by the court clerk's error, constituted "good cause" and thereby relieved the prosecutor of its burden under the statute. We first note that the judge's finding that the State did not contribute to the delay carries little significance. The mere fact that the delay was not caused by the prosecutor has never been considered dispositive because "to hold that good cause is supported by the lone fact that the delay was not caused by the prosecutor would contradict the language in section 77–29–1(4) which places the burden of complying with the statute on the prosecution." *Id.* at 426; *see also Wilson*, 453 P.2d at 159–60 (reversing trial court's decision not to dismiss, notwithstanding fact that prosecution did not cause delay).

[6, 7] The State argues that while it could have followed up on the case earlier, "defendant cites no precedent for attributing to the prosecutor the responsibility for anticipating or preventing unexpected and infrequent administrative mistakes made by court personnel." We agree with the State that it is not responsible for the administrative mistakes of the court. Nevertheless, it *is* responsible for complying with section 77–29–1. Because the statute places on the prosecutor *alone* the burden of bringing the case to trial within the 120–day period, the prosecutor's duty must be independent of the court's docketing system. While Heaton's case fell victim to an administrative "glitch" at the clerk's office, his case also fell through a crack in the prosecutor's office. Even though the prosecutor's office received Heaton's detainer notice on September 8, 1994, neither the briefs nor our review of the record indicates that the prosecutor even addressed Heaton's detainer notice to the court until February 16, 1995, after the disposition period had already expired. When a prisoner delivers a written notice pursuant to the detainer statute, the prosecutor has an affirmative duty to have the defendant's matter heard within the statutory period. Implicit in this duty is the duty to notify the court that a detainer notice has been filed and to make a good faith effort to comply with the statute. This is not to say that the prosecutor must succeed, for "good cause" may support the prosecutor's

failure to comply. However, where the prosecutor's failure is inaction—in this case, doing nothing whatsoever to bring Heaton's case to trial within the statutory period—the trial court may not conclude that the prosecutor's failure is supported by "good cause."

[8, 9] Nevertheless, even if the lower court erred in its legal conclusions, this court may affirm a trial court's decision on any reasonable legal basis, provided that any rationale for affirmance finds support in the record. *See K & T, Inc. v. Koroulis,* 888 P.2d 623, 628 (Utah 1994); *Hill v. Seattle First Nat'l Bank,* 827 P.2d 241, 246 (Utah 1992). Deciding whether the district court properly denied Heaton's motion to dismiss pursuant to the detainer statute requires a two-step inquiry. First, we must determine when the 120–day period commenced and when it expired. Second, if the trial was held outside the 120–day period, we must then determine whether "good cause" excused the delay.

[10] The detainer statute clearly provides that the 120–day period commences on the date the written notice is delivered "to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same." Utah Code Ann. § 77–29–1(1); *see also State v. Viles,* 702 P.2d 1175, 1176 (Utah 1985) (holding that 120–day disposition period commences from date of delivery of written notice to warden, not from date defense counsel files notice of appearance). However, this court has held that when a prisoner himself acts to delay the trial, he indicates his willingness to temporarily waive his right to a speedy trial. Thus, the disposition period must be extended by the amount of time during which the prisoner himself creates the delay. *See State v. Velasquez,* 641 P.2d 115, 116 (Utah 1982) (concluding that where defendant's trial date was originally scheduled less than one month after defendant's request for disposition and court granted defendant's request for continuance defendant was responsible for number of days during which continuance was granted and could not include those days in disposition period).

In the case at bar, the 120–day disposition period commenced on September 3, 1994, because that is the date on which an authorized agent at the prison received Heaton's written notice. However, Heaton did cause a trial delay. As set forth above, the court initially scheduled trial for September 9, 1994. At his pretrial conference on August 30, Heaton requested a preliminary hearing, which he had initially waived. The prosecutor having no objection, the court granted Heaton's request, changing the trial date to the preliminary hearing date. But for Heaton's request for a preliminary hearing, his case would have been brought to trial on September 9, just 6 days after his written notice had been delivered. Thus, Heaton delayed his own trial and indicated his willingness to temporarily waive his rights under the detainer statute. *See Velasquez,* 641 P.2d at 116.

When the court changed Heaton's trial date to the preliminary hearing date, in effect it continued Heaton's trial pending the outcome of the preliminary hearing. Had the court not found probable cause at the hearing, it would have had to dismiss the charges. *See* Utah R.Crim.P. 7(h)(3). However, the court did find probable cause and therefore scheduled a second arraignment for September 27. The court could not set a new trial date until Heaton entered his pleas at the second arraignment. Thus, because Heaton's trial date was continued for the purpose of accommodating his request for a preliminary hearing, and because a new trial date could not even have been considered until the second arraignment, Heaton may not include the 18 days between September 9 and September 27 as part of the 120–day disposition period.

Excluding the 18–day delay attributable to Heaton, the State had until January 19, 1995, to bring Heaton to trial. Although the court initially attempted to set the trial for January 19, 1995, it scheduled the trial beyond the disposition period because of the defense counsel's and prosecutor's scheduling conflict. Therefore, we must proceed to step two of our inquiry to determine whether continuing the trial to accommodate, in part, defense counsel's schedule constitutes "good cause" under section 77–29–1.

[11] A nearly identical issue was raised in *State v. Bonny*, 25 Utah 2d 117, 477 P.2d 147 (1970), wherein the initially scheduled trial date fell within the disposition period, but because defense counsel had a scheduling conflict the court rescheduled the trial for five days beyond the disposition period. This court concluded that section 77–65–1, the predecessor to section 77–29–1,[4] permitted the court to grant "'for a good cause shown in open court ... any necessary or reasonable continuance.'" *Bonny*, 477 P.2d at 147–48 (quoting Utah Code Ann. § 77–65–1). Thus, because the trial was rescheduled at defense counsel's request and to accommodate his schedule, this court held that the trial court had authority to grant such a continuance, which was "entirely reasonable and practical under the circumstances." *Id.* at 148.

Because section 77–29–1(3) contains substantially the same language as section 77–65–1 and gives the court discretion to grant continuances, the reasoning in *Bonny* is applicable to the case at bar. The January 19, 1995, date initially offered by the trial court fell within the 120–day disposition period, and the court was therefore within its authority to grant a reasonable continuance under section 77–29–1(3) to accommodate defense counsel's schedule. In light of the other criminal trial both defense counsel and the prosecutor were engaged in, setting Heaton's trial one month beyond the disposition period was not unreasonable. Therefore, we hold that while the district court erred in its legal conclusions, extending the trial date to a reasonable time outside the disposition period to accommodate, in part, defense counsel's schedule constitutes "good cause" under section 77–29–1(3) and (4), and the trial court correctly denied Heaton's motion to dismiss.

[12, 13] We next address Heaton's argument that he did not knowingly and intelligently waive his constitutional right to appointed counsel. The Sixth Amendment to the United States Constitution guarantees an accused the right to the assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 342–44, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462–63, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). If an accused is indigent, he is entitled to court-appointed counsel. *See State v. Wulffenstein*, 733 P.2d 120, 121 (Utah 1986). However, the Sixth Amendment also guarantees an accused the right to self-representation, "provided only that he [or she] knowingly and intelligently forgoes his [or her] right to counsel." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *see also Faretta v. California*, 422 U.S. 806, 807, 818, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

The right to have the assistance of counsel in a criminal trial is a fundamental constitutional right which must be jealously protected by the trial court. The United States Supreme Court has stated:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. *This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.*

Johnson, 304 U.S. at 465, 58 S.Ct. 1019 (emphasis added). Because of the importance of the right to counsel and the heavy burden placed upon the trial court to protect this right, there is a presumption against waiver, and doubts concerning waiver must be resolved in the defendant's favor. *See, e.g., Johnson*, 304 U.S. at 464, 58 S.Ct. 1019 ("'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights." (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 81 L.Ed. 1177 (1937))); *United States v. Williamson*, 806 F.2d 216, 220 (10th Cir.1986) (doubts concerning waiver of counsel must be resolved in defendant's favor).

[14–16] When a trial court is confronted with a defendant who either refuses to proceed to trial with appointed counsel or insists on proceeding pro se, the court must carefully consider the defendant's right to self-representation with his right to counsel. Nevertheless, before the court may permit the

4. Section 77–29–1, enacted in 1980, replaced section 77–65–1.

defendant to proceed without the assistance of counsel, the court must conduct a thorough inquiry of the defendant to fulfill its duty of insuring that the defendant's waiver of counsel is knowingly, intelligently, and voluntarily made. In making this determination, the court must advise the defendant of the dangers and disadvantages of self-representation "so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835, 95 S.Ct 2525 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)); *see Von Moltke v. Gillies*, 332 U.S. 708, 723–24, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *State v. Frampton*, 737 P.2d 183, 187–88 (Utah 1987). In addition, the trial court should (1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to represent himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story; and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case. *See State v. Frye*, 224 Conn. 253, 617 A.2d 1382, 1386–87 (1992); *see also Frampton*, 737 P.2d at 187–88.[5]

This court stated in *Frampton* that a colloquy on the record between the court and the defendant is the preferred method of determining the validity of a waiver of counsel. *Frampton*, 737 P.2d at 187. The reasoning behind this conclusion is that the information necessary for the court to make its determination generally "can only be elicited after penetrating questioning by the trial court." *Id.; see also Von Moltke*, 332 U.S. at 724, 68 S.Ct. 316 ("A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances."). In *Frampton*, we also stated that in the absence of such a colloquy, we will look at any evidence in the record to determine whether the particular facts and circumstances support a valid waiver. 737 P.2d at 188.

[17] However, in light of the foregoing discussion, this court is reluctant to assume the important responsibility which has been placed upon the trial court. After all, the trial court—having the benefit of questioning the defendant and observing his demeanor—is in the best position to determine whether the defendant knowingly, voluntarily, and intelligently waived his right to counsel. In contrast, this court's proper role is to review the trial court's findings and conclusions and then determine whether the trial court correctly concluded that the defendant validly waived counsel. A meaningful review of the trial court can take place only after that court has conducted a meaningful inquiry of the defendant. Therefore, in the absence of such a colloquy, this court will look at the record and make a de novo determination regarding the validity of the defendant's waiver only in extraordinary circumstances, the existence of which we will address on a case-by-case basis. *See Harding*, 834 F.2d at 857.

In the case at bar, the trial court clearly did not advise Heaton of the dangers and disadvantages of self-representation. The day before trial, during the hearing addressing Heaton's motion for new counsel, the trial judge stated:

> Now, with respect to counsel, you do have the right to represent yourself. I am not going to allow Mr. Caine's withdrawal at this point. Mr. Caine is a capable defense attorney. He is very familiar with the facts in your case. I am going to require that he remain on as counsel to assist you if you want the assistance.

5. In *Frampton*, as a guide for trial courts, this court quoted a sixteen-point colloquy recommended to the federal courts for use when confronting a prospective pro se defendant *Frampton*, 737 P.2d at 187–88 n. 12 (citing Bench Book for United States District Court Judges, vol. 1, §§ 1.02-2 to -5 (Federal Judicial Center, 3d ed. 1986)). Once again, we strongly recommend that trial courts use that approach, as it is an effective means by which to determine whether the defendant has validly waived his right to counsel.

> Mr. Heaton, if during the process of the Jury selection, and the defense that you want to present during the trial, you want to handle that on your own, you are free to do that. And you will be making that decision as you go. We will make a record of your decision to handle those matters on your own if that's your choice.
>
> My recommendation to you is that you rely on Mr. Caine's expertise and experience and have him help you. But you can make that choice.

The court's cursory recommendation to Heaton to rely on defense counsel did not apprise Heaton in any way of the constitutional significance of the right to counsel and the consequences of waiver. The State argues that Heaton should have been aware of the dangers and disadvantages of self-representation because on the day of trial, after the jury had been selected, the court strongly advised Heaton to allow defense counsel to cross-examine the State's witnesses inasmuch as Heaton would certainly not be as effective as defense counsel. While the court's advice was certainly appropriate, it addressed only one of the disadvantages of self-representation—i.e., not having experience and expertise in cross-examining witnesses. Moreover, the trial court had already determined that Heaton had decided to represent himself. As we have previously mentioned, before a trial court may permit a defendant to proceed pro se, the court must determine whether the defendant competently waived counsel at the time of waiver, not after.

We therefore hold that because the trial court failed to advise Heaton, at a minimum, of the dangers and disadvantages of self-representation, Heaton did not validly waive his constitutional right to counsel. The trial court erred in permitting Heaton to proceed pro se, and Heaton is entitled to a new trial. There are no extraordinary circumstances in this case which would justify our examination of the record and making a de novo determination as to whether Heaton knowingly and intelligently waived his right to counsel. Moreover, because the waiver of counsel issue is dispositive of this appeal, we need not address Heaton's other arguments.

We reverse Heaton's convictions and order a new trial.

HOWE, C.J., DURHAM, Associate C.J., and STEWART and ZIMMERMAN, JJ., concur in Justice RUSSON's opinion.

Lorin FACER, Plaintiff and Appellant,

v.

R. Lee ALLEN, Allen L. Jensen, James J. White, and Box Elder County, Defendants and Appellees.

No. 960463.

Supreme Court of Utah.

May 12, 1998.

Former justice court judge brought action alleging county commission's pre-election elimination of his precinct violated statutory prohibition against abolishing precincts within 90 days of an election. The First District Court, Box Elder County, Ben H. Hadfield, J., granted summary judgment in favor of county, and former judge appealed. The Supreme Court, Howe, C.J., held that: (1) statutory prohibition against pre-election changes applied to precinct in which justice court judge served, and (2) county commission violated statutory prohibition against pre-election changes when it combined two precincts 62 days prior to election, even though combination was not to take effect until over two months after election.

Reversed.

1. Appeal and Error ⇨842(1)

Interpretation of statutes poses a question of law, which Supreme Court reviews for correctness and without deference to the lower court's conclusions.

Tab C

MURRAY MUNICIPAL JUSTICE
SALT LAKE COUNTY, STATE OF UTAH

MURRAY CITY vs. BENJAMIN F LUCERO

CASE NUMBER 015003617 Misdemeanor DUI

CHARGES

Charge 1 - 41-6-44 - DRIVING UNDER THE INFLUENCE OF ALC/DRUGS
Class B Misdemeanor Plea: June 14, 2001 Not Guilty
Disposition: April 29, 2002 Guilty Plea
Charge 2 - 41-6-61 - IMPROPER USAGE OF LANES
Class C Misdemeanor Plea: June 14, 2001 Not Guilty
Disposition: April 29, 2002 Dismissed

CURRENT ASSIGNED JUDGE
GARY FERRERO

PARTIES

Defendant - BENJAMIN F LUCERO
4769 S 4620 W
KEARNS, UT 84118

Plaintiff - MURRAY CITY

DEFENDANT INFORMATION

Defendant Name: BENJAMIN F LUCERO
Date of Birth: May 15, 1947
Social Security Number: 528606706
Driver License Number: 6842620
Driver License State: UT
Law Enforcement Agency: UHP - SALT LAKE
Prosecuting Agency: MURRAY CITY
Citation Number: 351464
Violation Date: March 17, 2001 5300 S 600 W

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	1,850.00
	Amount Paid:	0.00
	Credit:	0.00
	Balance:	1,850.00

REVENUE DETAIL - TYPE: FINE

Amount Due:	1,850.00
Amount Paid:	0.00
Amount Credit:	0.00

Balance: 1,850.00

PROCEEDINGS

03-26-01	Filed: ORR Agreement	kgallego
04-05-01	ARRAIGNMENT scheduled on June 14, 2001 at 08:30 AM in Murray Justice Court with Judge FERRERO.	abearder
04-05-01	Notice - NOTICE for Case 015003617 ID 51436 ARRAIGNMENT is scheduled. Date: 06/14/2001 Time: 08:30 a.m. Location: Murray Justice Court 688 East Vine Street Telephone: 284-4280 Murray, UT 84107 Failure to appear may result in a warrant being issued for your arrest	abearder
04-05-01	Filed: Citation	abearde
04-05-01	Judge FERRERO assigned.	abearde
06-14-01	PRETRIAL CONFERENCE scheduled on July 20, 2001 at 09:30 AM in Murray Justice Court with Judge FERRERO.	gkittel
06-14-01	Minute Entry - Minutes for Arraignment Judge: GARY FERRERO PRESENT Clerk: gkittel Defendant Defendant pro se ARRAIGNMENT Advised of rights and penalties. PRETRIAL CONFERENCE is scheduled. Date: 07/20/2001 Time: 09:30 a.m. Location: Murray Justice Court 688 East Vine Street Telephone: 284-4280 Murray, UT 84107	gkittel
07-20-01	PRETRIAL CONFERENCE scheduled on October 26, 2001 at 09:30 AM in Murray Justice Court with Judge FERRERO.	kolsen
07-20-01	Minute Entry - Pretrial Conference continued Judge: GARY FERRERO PRESENT Clerk: kolsen Prosecutor: BROWER, BRIAN Defendant Defendant pro se	kolsen

CONTINUANCE

The Defendant has made a motion for continuance of Pretrial Conference.
The motion is granted.
Reason for continuance:
Will look into retaining private counsel
PRETRIAL CONFERENCE is scheduled.
Date: 10/26/2001
Time: 09:30 a.m.
Location: Murray Justice Court
688 East Vine Street
Telephone: 284-4280
Murray, UT 84107

07-20-01 PRETRIAL CONFERENCE Continued. kolsen
10-26-01 PRETRIAL CONFERENCE scheduled on January 02, 2002 at 01:30 PM in Murray Justice Court with Judge FERRERO. kolsen
10-26-01 Minute Entry - Pretrial Conference continued kolsen
Judge: GARY FERRERO
PRESENT
Clerk: kolsen
Prosecutor: BROWER, BRIAN
Defendant
Defendant pro se

CONTINUANCE

The Defendant has made a motion for continuance of Pretrial Conference.
The motion is granted.
Reason for continuance:
Retaining private counsel
PRETRIAL CONFERENCE is scheduled.
Date: 01/02/2002
Time: 01:30 p.m.
Location: Murray Justice Court
688 East Vine Street
Telephone: 284-4280
Murray, UT 84107

10-26-01 PRETRIAL CONFERENCE Continued.
01-02-02 BENCH TRIAL scheduled on April 29, 2002 at 01:30 PM in Murray Justice Court with Judge FERRERO. kolsen
01-02-02 Minute Entry - Minutes for PRETRIAL kolsen
Judge: GARY FERRERO
PRESENT
Clerk: kolsen

Prosecutor: BROWER, BRIAN
Defendant
Defendant pro se

HEARING

Case set over for a Bench Trial.
BENCH TRIAL is scheduled.
Date: 04/29/2002
Time: 01:30 p.m.
Location: Murray Justice Court
688 East Vine Street
Telephone: 284-4280
Murray, UT 84107

02-14-02 Filed: letter from Patty Collett ccamp
02-15-02 Note: cc/gf: In respone to the letter filed 2/14, Court advises Patty Collett to file a report regarding concerns w/ the defendant to the appropriate Law Enforcement Agency. ccamp
04-24-02 Note: BENJAMIN F LUCERO called to inform the court that he would like to just pay fine instead of trial. Def. will call the city to inform them of his decission. cherylc
04-29-02 SENTENCING scheduled on June 04, 2002 at 10:30 AM in Murray Justice Court with Judge FERRERO. kolsen
04-29-02 Filed: DUI rights waiver/enhancment kolsen
04-29-02 Minute Entry - Minutes for Bench Trial kolsen
Judge: GARY FERRERO
PRESENT
Clerk: kolsen
Prosecutor: CRITCHFIELD, GL
Defendant
Defendant pro se

The Information is read.
Court advises defendant of rights and penalties.
A pre-sentence investigation was ordered.
The Judge orders Intermountain Substance Abuse to prepare a Pre-sentence report.
TRIAL

Case has been resolved. Deft pled guilty to count I. Upon motion from the city court orders count II dismissed.
SENTENCING is scheduled.
Date: 06/04/2002
Time: 10:30 a.m.
Location: Murray Justice Court
688 East Vine Street
Telephone: 284-4280

Murray, UT 84107

05-23-02 Filed: ISA Presentence Report gkittel
06-03-02 Filed: ISA/PSR cherylc
06-04-02 Filed: ISA Presentence Report gkittel
06-04-02 REVIEW HEARING scheduled on September 05, 2002 at 01:30 PM in Murray Justice Court with Judge FERRERO. gkittel
06-04-02 Tracking started for Probation. Review date Dec 04, 2003. gkittel
06-04-02 Tracking started for Fine. Review date Sep 05, 2002. gkittel
06-04-02 Filed order: FORTHWITH (180 DAYS) gkittel
Judge gferrero
Signed June 04, 2002
06-04-02 Fine Account created Total Due: 1850.00 gkittel
06-04-02 Minute Entry - Minutes for SENTENCE, JUDGMENT, COMMITME gkittel
Judge: GARY FERRERO
PRESENT
Clerk: gkittel
Defendant
Defendant pro se

SENTENCE JAIL

Based on the defendant's conviction of DRIVING UNDER THE INFLUENCE OF ALC/DRUGS a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

SENTENCE FINE

Charge # 1
Fine: $1850.00
Suspended: $0.00
Surcharge: $855.41
Due: $1850.00

Total Fine: $1850.00
Total Suspended: $0
Total Surcharge: $855.41
Total Amount Due: $1850.00

The fine is to be paid in full by 09/05/2002.
ORDER OF PROBATION

The defendant is placed on probation for 18 month(s).
Probation is to be supervised by Murray Municipal Justice Court.
Defendant to serve 180 day(s) jail.

Defendant is to pay a fine of 1850.00 which includes the surcharge.
Pay fine on or before September 5, 2002.
Pay fine to The Court.

PROBATION CONDITIONS

NO FURTHER VIOLATIONS
NO CONSUMPTION OF ALCOHOL
RETURN TO COURT FOR REVIEW(S)
NO USE OF NON-PRESCRIBED CONTROLLED SUBSTANCES
IOP PROGRAM THROUGH ISA AFTER RELEASE FROM JAIL
IGNITION INTERLOCK INSTALLED WITHIN 30 DAYS OF RELEASE FROM JAIL
(COURT FINDS DEF. IMPECUNIOUS)
REVIEW HEARING is scheduled.
Date: 09/05/2002
Time: 01:30 p.m.
Location: Murray Justice Court
688 East Vine Street
Telephone: 284-4280
Murray, UT 84107

Tab D

" EXHIBIT ONE"

BRIAN E. BROWER, UBN 8486
MURRAY CITY ATTORNEY'S OFFICE
5025 S. STATE ST.
P.O. BOX 57520
MURRAY, UTAH 84157-0520
TELEPHONE: (801) 264-2642

IN THE THIRD JUDICIAL DISTRICT COURT
COUNTY OF SALT LAKE, STATE OF UTAH

BENJAMIN FRANK LUCERO, **Petitioner/Defendant** **vs.** **SHERIFF AARON D. KENNARD; CHIEF PAUL CUNNINGHAM; SALT LAKE COUNTY JAIL; MURRAY CITY JUSTICE COURT,** **Respondents/Plaintiff.**	**AFFIDAVIT OF MS. GWEN KITTEL SUPPORTING MURRAY CITY'S MOTION TO DISMISS PETITIONER'S REQUEST FOR EXTRAORDINARY POST-CONVICTION RELIEF** **Civil Case No. 020907208** **Judge: GLENN K. IWASAKI**

At all times herein mentioned, the affiant, Ms. Gwen Kittel, avers the following:

1. I am one of the two in-court clerks assigned to handle arraignment calendars in the Murray City Municipal Justice Court for Judge P. Gary Ferrero.

2. That prior to every arraignment, Judge Ferrero confirms that each defendant has watched the "Rights of Criminal Defendants" video narrated by Judge Hutchings.

3. That after confirming each defendant has seen the video explaining a defendant's rights at the arraignment hearing, Judge Ferrero orally advises each defendant of their rights, including their right to be represented by an attorney before he asks the defendant how they wish to plead.

4. That I was the in-court clerk for Mr. Benjamin Lucero's arraignment hearing on case

number 015003617 in the Murray Municipal Justice Court which took place on June 14, 2001.

5. That based on my review of the minute entries made by myself during Mr. Lucero's arraignment hearing as well as my experience observing thousands of arraignments performed by Judge Ferrero, it is my convincing belief that Judge Ferrero informed Mr. Lucero of his constitutional rights, including his right to be represented by an attorney and that if he could not afford to hire his own attorney, that one could be appointed for him free of charge.

RESPECTFULLY SUBMITTED this 21 day of August, 2002.

Ms. Gwen Kittel

Ms. Gwen Kittel, Affiant
Murray City Justice Court Clerk

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

On the 21st day of August, 2002, Ms. Gwen Kittel appeared before me, signer of the foregoing document, who duly acknowledged to me that she executed the same.

NOTARY PUBLIC
JENNIFER REUOTER
[illegible]
P.O. Box [illegible]
MURRAY, UT 84157
COMMISSION EXPIRES
FEB. 28, 2005
STATE OF UTAH

Jennifer Reuoter

Notary Public

Tab E

TRANSCRIPT OF JUDGE HUTCHINGS VIDEOTAPE

My name is Mike Hutchings. I am a judge in Salt Lake County. I have been asked to tell you about your rights.

If you are charged with a misdemeanor or an infraction, it is important that you listen carefully so that you will understand your rights before you talk to the judge today. The judge today will tell you about the misdemeanors or infractions that you are charged with committing. The judge will ask you to enter a plea of guilty, not guilty or no contest. I will now explain what each of these pleas means.

A plea of no contest means that you are not going to fight or challenge the charges that are brought against you. A no contest plea carries the same penalties as a guilty plea, but it means that you are not admitting that you are guilty. If you enter a plea of no contest, the judge may still sentence you to pay a fine, serve a jail term, perform community service work, pay restitution to a victim, or be on probation.

A plea of not guilty means that you are fighting or challenging the charges brought against you. If you plead not guilty, the judge will order that you come back another day for a trial or for a pretrial settlement conference.

If you plead guilty, you are admitting that the charges against you are true. If you plead guilty, the judge will make a decision about whether to order that you pay a fine, serve a jail term, perform some community service work, pay restitution to a victim, or be placed on probation.

If you enter a plea of guilty or a plea of no contest, you can ask the judge to sentence you today. However, you have the right to come back and be sentenced between two and thirty days from today's date. Before the judge decides on your sentence, you may speak to the judge and make an explanation and tell the judge anything that you want the judge to know about you or your circumstances.

If you plead guilty or no contest, you will not have a trial and you will be giving up or waiving certain rights. These rights are:

The right to have a speedy public trial;

The right to have a jury of persons who live in this county hear your case and decide if you are guilty or not guilty;

Also, the right to ask the judge to hear your case without a jury and decide if you are guilty or not guilty;

The right to testify at your own trial, and you may tell the judge or jury about your case at your trial;

The right to remain silent at your own trial. No one can make you testify at your own trial if you don't want to testify, and no inference either of guilt or innocence can be made because of your decision not to testify;

The right to be proven guilty of each charge beyond a reasonable doubt. The prosecutor must prove that you are guilty and must convince the judge or the jury that here's your case, that you are guilty beyond a reasonable doubt. If the prosecutor fails to convince the judge or the jury of your guilt, then you will be found not guilty;

The right to confront and cross-examine in open court all of the witnesses which the prosecution calls to testify against you;

The right to have your witnesses subpoenaed, at the prosecution's expense, to come to your trial and testify about your case. Even if the witnesses do not want to testify, the judge can order them to come to the trial and testify;

The right to appeal the decisions of the judge or the jury;

Also, the right to hire your own lawyer to represent you. If you will be hiring your own lawyer, please tell the judge today. If you want to have a lawyer represent you and if you do not have the money to hire one, you can ask the judge to appoint a public defender. You will need to tell the judge about your financial situation, and the judge will decide if you qualify for a public defender.

If you plead guilty or no contest and later wish to withdraw your plea, you must file a motion to withdraw your plea in court within thirty days.

Your decision to plead guilty, not guilty or no contest is your own personal decision. It is a decision that only you should make. You should not plead guilty or no contest if you are now under the influence of alcohol or drugs. You should also not plead guilty if anyone has made any threats against you or has promised you anything in return for your pleas of guilty or no contest.

I will now tell you about the different classifications of crimes and the potential punishments associated with each.

If you are charged with a class A misdemeanor, the judge could order you to pay a fine of up to $4,625 and also to serve a jail term of up to one year. If you are charged with a class B misdemeanor, the judge could order you to pay a fine of up to $1,850 and also to serve a jail term of up to 180 days. If you are charged with a class C misdemeanor, the judge could order you to pay a fine of up to $1,387.50 and also to serve a jail term of up

to 90 days. If you are charged with an infraction, the judge could order you to pay a fine of up to $1,387.50. The judge cannot impose a jail term if you are charged with an infraction.

If you are charged with more than one crime, the judge can impose consecutive sentences. That means that the judge may impose separate jail sentences that do not run at the same time. The judge may order that you serve one jail sentence for one crime, and when that jail sentence is finished, you would begin to serve the second jail sentence for the second crime and so forth.

Please also listen carefully to all of the orders that the judge gives to you. If, for example, you are ordered to pay a fine or complete community service by a certain date, be sure that you do it, or a warrant for your arrest will be issued. If you cannot follow an order given by the judge, you should discuss the matter with your lawyer or you should come back to the court and talk to the judge about the problem. Often, extensions for time payment of fines and completion of other court orders can be given by the judge.

I have attempted to explain your rights as clearly as I can. Your rights are important, and it is important that you understand them. If you do not understand them, you may ask the judge about them or you may ask the judge to let you talk to your own lawyer or with a public defender.

This will end the tape of the judge's statement of rights. Thank you.

Tab F

But my understanding is, although he--Judge Ferrero has done many hundred of these things, far more than District Court Judges do, they do them all day and it's hard to remember any one particular person, he does remember Mr. Lucero.

THE COURT: So, he does have a specific recollection?

MR. DANIELS: Well, let me just say, he has a vague specific recollection.

THE COURT: Very well.

MR. DANIELS: He can't testify, I don't think, and tell you, I remember telling Mr. Lucero X, Y and Z. He'll say, I remember Mr. Lucero. And here's what I did with him because this is what I always do. He can testify about his usual procedure.

And generally, it's this: He has them sign the waiver and then he says to them, now that you've signed these things and waived your rights, I need to satisfy my mind that you're doing this freely and voluntarily and you understand the consequences of it and he goes through those things one by one. And of course, that is in the file.

He goes through the elements of the offense. He goes through the possible sentences. He tells them that--about each of the rights they're waiving and in this case, in particular, one of those rights as you can see, is the right

to be represented by counsel.

Now, there's some--in the petition, there is memorandum, she makes--she says it's a little unclear as to whether he really has a right or whether he doesn't. I asked Judge Ferrero about that and he says, well, in fact, it--the way it's stated is exactly correct. That is to say, if a--if--you're not always afforded an attorney because you can't afford one. I mean, many of us, if we were charged with a serious crime probably couldn't afford an attorney.

THE COURT: Indigency is not an issue in this matter. It's right to counsel, and whether or not he exercised that right, whether it was afforded or not, either indigent or not indigent. To me, indigency is not the central issue the Shelton case.

MR. DANIELS: And I agree with that.

I--I think that Judge Ferrero would testify that he goes through that with him, he helps him understand that he does have a right to an attorney, that if he can't afford one, one will be appointed. That's in addition to what he's already seen on the--on the videotape.

And then when he is through asking him all those questions, if he's satisfied that it's free--done freely and voluntarily and knowingly and that he's not under the influence of substances or whatever, then he signs the thing and that his signature is certification of that. That would

be his testimony if he were called as a witness.

THE COURT: All right.

Ms. Brereton, do you have any differing opinions as to burden of going forward, vis-a-vis burden of proof in this matter?

MS. BRERETON: I do think that by bringing that petition, that we have satisfied the burden that we have, that we make--we've alleged, or Mr. Lucero's alleged that he did not understand and that he was sentenced to jail and was not given an attorney.

THE COURT: But in all--in all respects to this Mr. Daniels, this was not a verified petition, was it?

MS. BRERETON: It was not.

THE COURT: All right. And so I think there has to be something on the record--

MS. BRERETON: The other--

THE COURT: --unless you want to just proffer it.

MS. BRERETON: Well, I would proffer--

THE COURT: Yeah.

MS. BRERETON: --that defendant did not understand and we would make that proffer. I think there's also evidence to that in the docket that we have before us and in the record because Mr. Lucero, in this case, did on two occasions ask that the matter be continued at pre-trial conference, so that he could speak with an attorney. There's nothing to indicate

Tab G

"EXHIBIT THREE"

BRIAN E. BROWER, UBN 8486
MURRAY CITY ATTORNEY'S OFFICE
5025 S. STATE ST.
P.O. BOX 57520
MURRAY, UTAH 84157-0520
TELEPHONE: (801) 264-2642

IN THE THIRD JUDICIAL DISTRICT COURT
COUNTY OF SALT LAKE, STATE OF UTAH

BENJAMIN FRANK LUCERO, **Petitioner/Defendant** **vs.** **SHERIFF AARON D. KENNARD; CHIEF PAUL CUNNINGHAM; SALT LAKE COUNTY JAIL; MURRAY CITY JUSTICE COURT,** **Respondents/Plaintiff.**	**AFFIDAVIT OF MS. KAYLYNN OLSEN SUPPORTING MURRAY CITY'S MOTION TO DISMISS PETITIONER'S REQUEST FOR POST-CONVICTION RELIEF** **Civil Case No. 020907208** **Judge: GLENN K. IWASAKI**

At all times herein mentioned, the affiant, Ms. Kaylynn Olsen, avers the following:

1. I am one of the two in-court clerks assigned to handle pre-trial and trial calendars in the Murray City Municipal Justice Court for Judge P. Gary Ferrero.

2. That prior to accepting any guilty plea, Judge Ferrero orally advises each defendant of their rights, including their right to be represented by an attorney.

3. That I was the in-court clerk for each of Mr. Benjamin Lucero's pre-trial conferences on case number 015003617 in the Murray Municipal Justice Court.

4. That based on my review of the minute entries made by myself during Mr. Lucero's pre-trial conferences, the case was continued on at least two separate occasions at the defendant's request so that he could retain an attorney.

5. That based on my review of the minute entry made by myself at Mr. Lucero's hearing on April 29, 2002, as well as my experience observing Judge Ferrero accepting thousands of guilty pleas, it is my convincing belief that prior to accepting Mr. Lucero's guilty plea, Judge Ferrero orally informed Mr. Lucero of his constitutional rights, including his right to be represented by an attorney and that if he could not afford to hire his own attorney, that one could be appointed for him free of charge if he qualified based on his income.

6. That based on my review of the minute entry made by myself as well as the Justice Court's case file on the aforementioned matter, that Mr. Lucero executed a written rights waiver informing him of his right to counsel and expressing his desire to waive that right.

RESPECTFULLY SUBMITTED this 21 day of Aug, 2002.

Kaylynn Olsen

Ms. Kaylynn Olsen, Affiant
Murray City Justice Court Clerk

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

On the 21st day of August, 2002, Ms. Kaylynn Olsen appeared before me, signer of the foregoing document, who duly acknowledged to me that she executed the same.

NOTARY PUBLIC
JENNIFER REUDTER
[illegible] #106
P.O. Box [illegible]
MURRAY, UT 84157
COMMISSION EXPIRES
FEB. 28, 2005
STATE OF UTAH

Notary Public

Tab H

IN THE MUNICIPAL JUSTICE COURT IN AND FOR THE CITY OF MURRAY, COUNTY OF SALT LAKE, STATE OF UTAH

CITY OF MURRAY vs. Lucero, Benjamin Defendant	**DRIVING UNDER THE INFLUENCE RIGHTS WAIVER** Judge: P. Gary Ferrero

STATEMENT OF DEFENDANT ENTERING A GUILTY PLEA
DECLARACIO´N DEL ACUSADO QUE SE DECLARA CULPABLE

NOTIFICATION OF CHARGES
NOTIFICACIO´N DE LAS ACUSACIONES

I have received and read or had read to me a copy of the information which states the crime(s) with which I am charged. I understand the charges against me. I have no questions about what I am accused of having done.

He recibido y he leido o se me ha le´ido una copia del informe el cual describe el(los) delito(s) del(de los) cual(es) se me acusa. Entiendo el(los) cargo(s) en mi contra y no tengo pregunta alguna al respecto de lo que se me acusa de haber hecho.

WAIVER OF CONSTITUTIONAL RIGHTS
RENUNCIA DE LOS DERECHOS CONSTITUCIONALES

Under the constitution of Utah and of the United States I have the following right:
Bajo la constitucio´n del Estado de Utah y de los Estados Unidos, tengo los siguientes derechos:

1) COUNSEL:. I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.
1) **ABOGADO: Tengo el derecho de consultar con un abogado y que e´ste me represente. Si el juez determinara que no tengo los fondos para contratar un abogado, el juez puede asignar uno para que me represente. Puede ser que despue´s, si el juez determinara que teni´a o tengo las posibidades de contratar un abogado, se me requiera pagar por los servicios legales que se me proporcionaron.**

2) PRIVILEGE AGAINST SELF INCRIMINATION: Although I can choose to testify if I wish, I cannot be forced by anyone to take the witness stand and testify or give evidence against myself. That I choose not to testify cannot be held against me in court.
2) **PRIVILEGIO EN CONTRA DEL LA AUTOINCRIMINACIO´N: Aunque puedo escoger testificar si lo deseo, nadie me puede forzar a pasar al estrado de los testigos y testificar o dar evidencia en mi contra. Mi decisio´n de no testificar, no se puede utilizar en mi contra durante el juicio.**

3) CONFRONTATION AND CROSS EXAMINATION OF ACCUSERS: I have a right to see

and hear in open court the witnesses who give evidence against me. I have, if I represent myself or my attorney has, in my behalf, the right to ask questions of those witnesses. I also have the right to have witnesses who will testify in my behalf subpoenaed or, in other words, called to court at government expenses.

3) CONFRONTACIO´N Y CONTRAINTERROGACIO´N DE LOS ACUSADORES: **Tengo el derecho de ver y de escuchar a los testigos que presen pruebas en mi contra en una audiencia pu´blica. Tengo, si me representara a mi´ mismo o si lo hiciera mi abogado, el derecho de interrogar a esos testigos. Tambi´en tengo el derecho de que se emplacen a los testigos para que testifiquen a mi favor, o en otras palabras, que se llamen al tribunal a cuenta del gobierno estatal.**

4) JURY TRIAL: I can choose to have a jury hear the case against me. Any verdict rendered by a jury, whether it be guilty or not guilty must be by complete agreement of all jurors.

4) **JUICIO ANTE UN JURADO: Puedo escoger que un jurado escuche el caso en mi contra. Cualquiera que sea el veredicto que el jurado dicte, ya sea de culpable o no culpable, tendra´ que ser por medio de un acuerdo una´nime de todos los miembros del jurado.**

5) PRESUMPTION AND PROOF: At trial I am presumed innocent until proven guilty. The burden of proving me guilty of the crime(s) charged is upon the prosecutor who must prove each and every element of a crime beyond a reasonable doubt.

5) **PRESUNCION Y PRUEBA: En el juicio, se me considera inocente hasta que se compruebe mi culpabilidad. El peso de probar mi culpabilidad por el(los) delito(s) que se me acusa(n) cae sobre el fiscal, el cual debe probar ma´s alla´ de una duda razonable cada uno y todos los elementos del(se los) delito(s).**

6) APPEAL: If I were to be tried and convicted of the crime(s) with which I am charged. I could appeal from any errors of law that may have resulted in my conviction.

6) **APELACIO´N: Si se me enjuiciara y condenara por el(los) delito(s) del(de los) cual(es) se me acusa(n), podr´ia apelar debido a cualquier error de derecho que haya resultado en mi condena.**

I understand each of these constitutional rights. They have been explained to me by the judge or a lawyer. I have no question about them. I know that I could plead not guilty and exercise all of the rights listed above. I understand that by entering a plea of guilty. I AM GIVING UP THESE CONSTITUTIONAL RIGHTS.

Entiendo cada uno de estos derechos constitucionales. El juez o el abogado me los ha explicado y no tengo pregunta alguna al respecto. Se´ que puedo declararme no culpable y ejercer todos los derechos mencionados previamente. Entiendo que al declararme culpable. ESTOY RENUNCIANDO A ESTOS DERECHOS CONSTITUCIONALES.

CONSEQUENCES OF ENTERING A GUILTY PLEA
CONSECUENCIAS DE UNA DELARACION DE CULPABILIDAD

I am admitting that I did commit the crime(s) to which I plead guilty. I convict myself the same as if I were found guilty by a judge or jury. Where more that one crime is involved, sentences my be imposed one after another, consecutively, or may run at the same time, concurrently. In sentencing me the judge is not required to follow what any other person recommends. The judge must impose sentence within the following limits:

Estoy admitiendo que cometi´ el(los) delito(s) al(a los) cual(es) me estoy declarando culpable. Me condeno de la misma manera como si un juez o un jurado me hubiera encontrado culpable. Si existiera ma´s de un delito, las sentencias se podri´an imponer una seguida de la otra (consecutivamente); o se podri´an servir al mismo tiempo (simulta´neamente). No se requiere que el juez siga la recomendacio´n de otras personas en el di´a que se dicte mi pena. El juez debe dictar la pena dentro de los siguientes li´mites:

OFFENSE **DELITO**	JAIL **CARCEL**	FINE **MULTA**
Class B Misdemeanor	0 - 180 days	$0 - $1,850.00
Class C Misdemeanor	0 - 90 days	$0 - $ 750.00
Infraction	0 days	$0 - $ 750.00
Delito Menor Clase B	**0 - 180 dias**	**$0 - $1,850.00**
Delito Menor Clase C	**0 - 90 dias**	**$0 - $ 750.00**
Infraccion	**0 dias**	**$0 - $ 750.00**

Certain crimes require added fees or other conditions of sentencing. Some penalties for certain crimes may be made greater or enhanced, if there are other convictions for similar crimes. I understand these consequences and have no questions about them.

Ciertos delitos requieren que se les añadan multas u otras condiciones a la pena. Algunas penas por ciertos delitos, si hubiesen otras condenas por delitos similares, pueden ser mayores o se pueden aumentar. Entiendo estas consecuencias y no tengo pregunta alguna al respecto.

ENTRY OR GUILTY PLEA
DECLARACIÓN DE CULPABILIDAD

Of my own choice I enter this plea. No force, promises or threats have been made to get me to do it. I am not under the influence of alcohol or drugs or anything that would impair my judgement right now. I have read this document or had it read to me. I understand is contents and adopt each statement in it as my own. By signing this document I am saying that I ENTER A PLEA OF

Hago esta declaración por decisión propia. No se me ha obligado, prometido, ni amenazado para que lo haga. No estoy bajo la influencia del alcohol, drogas o nada que pueda afectar mi sano juicio en este momento. He leído o se me ha leído este documento. Entiendo el contenido de dicho documento y adopto cada declaración como propia. Al firmar este documento, estoy diciendo que ME DECLARO

GUILTY to:
CULPABLE DE: DRIVING UNDER THE INFLUENCE OF ALCOHOL/DRUGS, MB
Names of crime(s) and Class of crime(s)
Nombre de(de los) delito(s) y Clase del(de los) delito(s)

Statement of specific comprising elements of each offense and special terms if applicable (plea negotiation, no contest plea, etc.):

Declaración de los elementos específicos por cada delito y arregos especiales si se aplican (negociaciones, declaración de no disputar, etc.):

1. OPERATE OR ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE

2. UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

3. IMPAIRED (.08 OR HIGHER BLOOD ALCOHOL) OR INCAPABLE OF SAFELY OPERATING THE VEHICLE

I further understand that if I am in this country illegally, I am subject to deportation by the Department of Immigration and Naturalization Service. Further that if I am an Alien with Legal Resident status my status may be revoked and I could be subject to deportation

Adema´s entiendo que si estoy ilegalmente en este pais, estoy sujeto a ser deportado por el Departamento de Servicios de Inmigracio´n y Naturalizacio´n. Ademas si soy un extranjero con un estado de Residencia Legal, mi estado puede ser revocado y puedo estar suejeto a deportacio´n.

I further understand that if convicted and deported and I re-enter illegally I am subject to prosecution in the federal courts for illegal re-entry if the conviction was a misdemeanor. If the conviction was for felony or a Class A misdemeanor it can be aggravated re-entry.

Adema´s entiendo que si soy condenado por un delito menor y deportado y regreso ilegalmente estoy sujeto a ser procesado en los tribunales federales por regresar ilegalmente. Si la condena fue por un delito mayor o un delito menor Clase A. Puedo ser enjuiciado por regresar con agravantes

I UNDERSTAND THAT I HAVE THE RIGHT TO WITHDRAW THIS PLEA WITHIN 30 DAYS OF TODAY'S DATE AS LONG AS THE REQUEST IS IN WRITING AND FOR GOOD CAUSE SHOWN.

ENTIENDO QUE TENGO EL DERECHO DE RETIRAR ESTA DECLARACION DENTRO DE UN PLAZO EL DE 30 DIAS DESDE EL DIA DE HOY, CON TAL DE QUE LA PETICION SEA HECHA POR ESCRITO Y POR UNA BUENA RAZON.

4/29/02

Date
Fecha

Defendant's Signature
Firma del Acusado

Defendant's Attorney
Abogado Defensor

Hon. P. Gary Ferrero
Judge, Murray Municipal Justice Court
Juez

Tab I

Heather Brereton (8151)
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Attorneys for Petitioner
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Telephone: 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Benjamin Frank Lucero,
Petitioner,

vs.

Sheriff Aaron D. Kennard; Chief Paul Cunningham; Salt Lake County Jail; Murray City Justice Court,
Respondents.

AFFIDAVIT OF IMPECUNIOSITY

Case No. 020907208
Judge: Iwasaki

STATE OF UTAH)
:ss
COUNTY OF _____)

I, Benjamin Frank Lucero, do solemnly swear that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence (or the appeal which I am about to take), and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

(a) I, Benjamin Frank Lucero, am a resident of SLCo and incarcerated at the Salt Lake County Jail, Salt Lake City, Utah.

(b) My amount of income, including government financial support, alimony, child support is $ 0 per month.

(c) Assets owned, including real and personal property is: 78 chev truck 81 Harly Davidson 81 chev Jay.

(d) Business interests: Ø

(e) Accounts receivable: Ø

(f) Securities, checking and savings account balances: Ø

(g) Debts: Credit Cards 3500.00

(h) Monthly expenses: 800.00

DATED this 31 day of July, 2002.

SUBSCRIBED AND SWORN TO before me this 31 day of July, 2002

NOTARY PUBLIC
Patricia A. Rodman
424 East 500 South #300
Salt Lake City, Utah 84102
My Commission Expires
June 2, 2005
STATE OF UTAH

Patricia A. Rodman
NOTARY PUBLIC
Residing at:

Heather Brereton (8151)
SALT LAKE LEGAL DEFENDER ASSOCIATION
Attorneys for Plaintiff
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Benjamin Frank Lucero, Petitioner, vs. Sheriff Aaron D. Kennard; Chief Paul Cunningham; Salt Lake County Jail; Murray City Justice Court, Respondents.	**APPLICATION TO PROCEED IN *FORMA PAUPERIS*, SUPPORTING DOCUMENTATION AND ORDER** Case No. 020907208 Judge: Iwasaki

I, Benjamin Frank Lucero, declare according to Utah Code Ann. § 21-7-3 that I am the plaintiff in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action is briefly stated as follows: **That I am entitled to relief under Rule 65C since the conviction or sentence in my criminal case was imposed in violation of the state and federal constitutions.**

As required by state law, I hereby answer the following questions:

1. Are you presently employed? (If an inmate, are you employed in an inmate program or work release program).....Yes ☐ No ☑

   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer (list both gross and net salary):

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received: Feb $2300 Per hour

2. Are you representing yourself in this lawsuit?.....Yes ☑ No ☐

3. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or other form of self-employment?.....Yes ☐ No ☑
   b. Rent payments, interest or dividends?.....Yes ☐ No ☑
   c. Pension, annuities or life insurance payments?.....Yes ☐ No ☑

d. Gifts or inheritance?.....Yes ☐ No ☑

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months:

4. Do you own any cash, or do you have money in checking or savings account? (Include any funds in prison accounts.).....Yes ☐ No ☑

If the answer is "yes", state current balance .....$_____

5. Do you own or have any interest in any real estate, stocks, bonds, notes, automobiles or other property of value?.....Yes ☑ No ☐

If the answer is "yes," describe the property, specify its location, and state its approximate value:
78 Chev truck 1500.00 81 Chev Jon 2000.00 81 Harley 3500.00

6. List persons who are dependent upon you for financial support, state your relationship to those persons, and indicate how much you contribute toward their support:

7. Are you receiving alimony?.....Yes ☐ No ☑
If "yes", how much per month?.....$_____

8. Annual untaxed income and benefits:

a. Social security benefits.....$ 0
b. Aid to Families with Dependant Children (AFDC or ADC).....$ 0
c. Child Support.....$ 0
d. Welfare Benefits.....$ 0
e. Worker's Compensation.....$ 0
f. Veterans noneducational benefits such as Death Pension, Dependency, and Indemnity Compensation .....$ 0
g. Housing, food, and other living allowances paid to members of the military, clergy. and others.....$ 0

Total.....$ 0

9. Are you receiving funds or money from any other sources?.....Yes ☐ No ☑

if the answer is "yes", please list:

******

I declare under penalty of perjury that the foregoing information is true and correct.

Executed on 7/31/02
(date)

(Signature of Applicant)

******

NOTARY PUBLIC
Patricia A. Rodman
424 East 500 South #300
Salt Lake City, Utah 84102
My Commission Expires
June 2, 2005
STATE OF UTAH

(seal)

Patricia A. Rodman
Notary Public
My Commission Expires: